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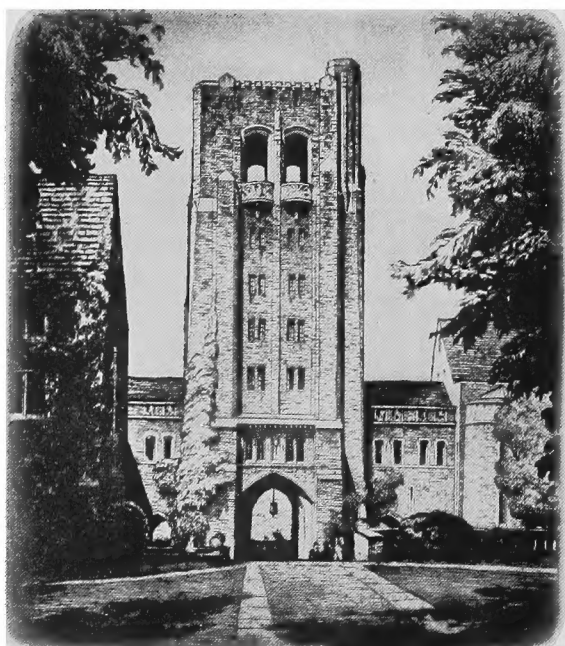
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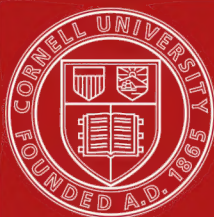


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A TREATISE
ON THE
COMMON AND STATUTE LAW OF THE STATE OF NEW YORK
RELATING TO
INSOLVENT DEBTORS,
INCLUDING THE
THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, AND EIGHTH ARTICLES, OF
TITLE 1, CHAP. 6, PART 2, OF THE REVISED STATUTES,
AND THE
LAW OF VOLUNTARY ASSIGNMENTS
FOR THE BENEFIT OF CREDITORS,
INCLUDING THE
General Assignment Act of 1877, as amended;
TOGETHER WITH A CHAPTER ON
COMPOSITIONS AND COMPOSITION DEEDS,
AND AN
APPENDIX OF FORMS.

BY JAMES L. BISHOP.

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P R E F A C E.

THE purpose of this work is to present, in a convenient and harmonious form, the statutes and decisions of the State of New York, constituting what may be called the Insolvency System of the State.

This plan includes a review of the various articles of the first title, of the sixth chapter, of the second part of the Revised Statutes, relating to insolvent debtors, among which are embraced the important statute for the discharge of Insolvent Debtors from their debts, known as the "Two-third Act," and also the statutes for the exoneration of insolvents from arrest and their discharge from imprisonment on execution in civil actions, the latter of which is sometimes called the "Fourteen-day Act."

The scope of the work also covers a consideration of the law of general assignments for the benefit of creditors. This subject has of late been regulated to some extent by "The General Assignment Act of 1877." The attempt is here made to present the law of assignments as expounded by our courts with a special view to that statute, and also to state and illustrate, as fully as the adjudged cases warrant, the practice under that act.

The statute, however, has not materially altered the common law in reference to the validity and effect of such instruments, and the rules of law established by the courts in an extremely numerous class of cases have necessarily fallen under review.

In conclusion, a brief chapter on the law of Compositions and Composition Deeds has been added.

These various topics, although independent of each other, constitute together an important subdivision of the law of debtor and creditor, and through them must be worked out in the main, the problems which arise in cases of insolvency. Indeed, no other distinctive system of bankruptcy or insolvency has ever existed under the laws of this State.

The repeal of the Federal Bankrupt Law, has again brought into full operation this system of law—if system it may be called—and it now remains to be seen how fully it will meet the requirements of the present conditions of business.

Some changes are doubtless desirable and are to be expected, but while the law continues as it is, and even after any legislation which may reasonably be anticipated, the distinctive branches of the law here discussed, must continue to form an important part of professional study.

The author is conscious, as every one must be who undertakes the investigation of any extended branch of jurisprudence, of the wide difference between that which he has accomplished and that which remains to be done. He submits the results of his labor, with no pretension to having done more than to render somewhat less difficult of access the scattered declarations of the law contained in the statutes and reports.

NEW YORK, November, 1878.

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ERRATA.

Page 132, line 18, *for* "land" *read* "law."

Page 136, line 26, *for* "sue" *read* "sell."

Page 143, line 6, *for* "1878" *read* "1877."

Page 151, line 31, *insert* "in" *before* "the assignee."

Page 151, line 32, *strike out* "in an action."

Page 277, line 8, *for* "XXIII" *read* "XXVI."

Page 299, line 31, *for* "262" *read* "294."

Page 389, line 20, *for* "Cow." *read* "Co."

INSOLVENT DEBTORS.

CHAPTER I.

INTRODUCTORY.

INSOLVENCY AND INSOLVENT LAWS.

§ 1. *Definitions.*—Insolvency is the inability to pay one's debts. Inability to pay, however, is frequently qualified by circumstances of time and manner.¹ Hence the exigencies which will establish insolvency in one class of cases may fail to do so in another. The word consequently often varies in signification according to the several occasions of inquiring into it. Cowen, J., in *Herrick v. Borst*, 4 Hill, 650, 654. As the term is used in insolvent and bankrupt laws, especially as applied to traders, it means the condition of a person unable to pay his debts as they fall due, in the usual course of trade or business. Ellenborough, C. J., in *Bayley v. Schofield*, 1 M. & S. 338, 350; Field, J., in *Toof v. Martin*, 13 Wall. 40; *Buchanan v. Smith*, 16 Wall. 277; *In re Randall & Sunderland*, 3 N. B. R. 18; *Brouwer v. Harbeck*, 9 N. Y. 589; *Thompson v. Thompson*, 4 Cush. (Mass.), 127; *Lee v. Kilburn*, 3 Gray (Mass.), 594; 2 Bell Com. 162. In this restricted sense a person may be insolvent although he may be able to pay all his

¹ "It is true that 'insolvency' and 'inability to pay' are synonymous, but solvency does not mean ability to pay at all times, and under all circumstances, and everywhere on demand; nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him." Robertson, Ch. J., in *Walkenshaw v. Perzel*, 4 Robt. 426; s. c. 32 How. Pr. 233.

debts at some future time, upon a settlement and winding-up of his affairs. *Thompson v. Thompson*, 4 Cush. (Mass.), 127; *Ferry v. Bank of Cent. New York*, 15 How. Pr. 445; *Bell v. Ellis*, 33 Cal. 620. In its popular and general sense insolvency is used to denote the insufficiency of the entire property and assets of an individual to pay his debts.¹ *Toof v. Martin*, 18 Wall. 40; *Curtis v. Leavitt*, 15 N. Y. 9, 141; *Walkenshaw v. Perzel*, 4 Robt. 426; s. c. 32 How. Pr. 233; *Churchill v. Well*, 9 Cold. (Tenn.), 364. And it is in this sense that the word seems to be used in the statute of this State (1 R. S. 591, § 9), prohibiting assignments and conveyances by corporation when insolvent or in contemplation of insolvency, with intent to give a preference. *Curtis v. Leavitt*, *supra*, 138, 139; see *Dutcher v. Importers & Traders' Nat. Bank*, 59 N. Y. 5.

What constitutes insolvency and what proof is sufficient to establish the fact are questions of importance in a variety of actions,² in which the rights of individual creditors are con-

¹ In the case of *Queen v. Saddlers' Co.* (10 H. of L. 404), much discussion was had upon the signification of the term insolvency. In that case a chartered company had enacted a by-law which provided "that no person who has become a bankrupt or otherwise insolvent, shall hereafter become a member of the court of assistants of this company." The relator was elected a member of that court, but was at the time not possessed of sufficient means to pay his liabilities, although continuing business without default. A short time after he was declared bankrupt. The judges were nearly equally divided in opinion as to whether the relator was to be regarded as insolvent within the meaning of the by-law at the date of his election. The Lords, however, were of the opinion that the by-law pointed to some overt act of insolvency, such as taking the benefit of the insolvent law, or stopping payment, or compounding.

² Thus, a surety who has requested the creditor to sue the principal at a time when he was solvent, may be discharged on proof that the principal has subsequently become insolvent. In such a case insolvency is said to mean that the debtor is in such a condition that the demand cannot be collected out of his property by due process of law. Nelson, J., in *Huffman v. Hulbert* (18 Wend. 377), though Cowen, J., in *Herrick v. Borst* (4 Hill, 650, 657), thought the test should be whether the debtor was able to pay his debts according to the ordinary usage of trade. So a vendor can only exercise the right of stoppage *in transitu* against an insolvent or bankrupt buyer, and, in that connection, by insolvency is meant a general inability to pay one's debts, and of this inability to pay one just and admitted debt would probably be sufficient evidence. Benjamin on Sales, § 837, and cases cited. So in cases where a creditor is permitted to proceed against the estate of deceased partner, upon proof of the insolvency of the survivors, the inability to collect the debt against the survivors by process of law, as evidenced by

cerned. But these are instances of what may be termed simple insolvency as distinguished from notorious or legal insolvency.

Such notorious or legal insolvency, which is the principal topic of the present treatise, is the situation of a person who has done some notorious act to divest himself of all his property, as making an assignment, or applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws. This is the sense of the word as employed in the statutes of the United States, giving a priority to the United States in cases of insolvency. R. S. U. S. § 3466; *Prince v. Bartlett*, 8 Cranch. 431; s. c. 9 Mass. 431; *Thelusson v. Smith*, 2 Wheat. 396. And such acts are, as against the debtor, conclusive evidence of insolvency. *Morewood v. Hollister*, 6 N. Y. 309.

§ 2. *Bankruptcy and insolvency distinguished.*—Using the words now as indicating a legal status, bankruptcy is the position in which a man becomes placed when he has committed an act of bankruptcy and is thereupon adjudged a bankrupt; insolvency is a man's position when he becomes subject to the laws relating to insolvents, and is brought within the jurisdiction of the insolvent laws. Cockburn, Ld. Ch. J., in *Queen v. Saddlers' Co.* 10 H. of L. 404, 453. This brings into distinction two systems of laws which were formerly much more widely distinguished than at present. The English bankruptcy system, as established by the earlier statutes, applied to traders only; it did not provide any method by which a debtor could voluntarily bring himself within the operation of the bankrupt laws, nor did it discharge the bankrupt from his debts. Down to 4 and 5 Anne, the bankrupt continued liable for his debts, and the dividends under the commission were only considered a payment *pro tanto*. Kent, Ch. J., in *Murray v. De Rottenham*, 6 John. Ch. 52, 64.

But the benefits of a discharge were available only to traders, and to such traders only as were proceeded against *in invitum*. There remained, therefore, a large class of insolvent debtors

the return of an execution unsatisfied, will lay the foundation for such an action, although the survivor may have had property out of which the execution might have been satisfied, which was not discovered by the sheriff. *Pope v. Cole*, 55 N. Y. 124; see *Wheelock v. Kosh*, 77 Ill. 296.

liable, so long as imprisonment for debt was an ordinary remedy, not only to be stripped of their property but also to be deprived of their liberty, without relief from the bankrupt law or from any other source.¹ It was to meet the necessities of this class of debtors that insolvent laws were first enacted, and the relief afforded consisted not in discharging the insolvent from his debts, but simply in exonerating his person from imprisonment, and these laws resembled bankrupt laws only in so far as they both contemplated an equal division of the debtor's present effects among his creditors *pro rata*. As we shall presently see, the English insolvent laws were gradually extended to include the discharge of the debtor from his debts as well as from imprisonment, while the bankruptcy laws were also extended to include all classes of debtors, and thus the two systems were brought into assimilation.

In this country the term bankrupt law has been, for the most part, confined to such enactments as have been made by Congress, under its constitutional power to establish uniform laws upon the subject of bankruptcies throughout the United States, while the laws passed by the various States, whether properly insolvent or bankrupt laws, have been designated as insolvent laws. "No distinction," says Justice Story, "was ever practically or even theoretically attempted to be made between bankruptcies and insolvencies, and a historical review of the colonial and State legislation will abundantly show that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws. Story on Cons. § 1111. See Ch. J. Marshall, in *Sturges v. Crowninshield*, 4 Wheat. 122, 195.

§ 3. *English insolvent legislation.*—The first English act for the relief of insolvent debtors was enacted in 1670 (22 & 23 Chas. 2, ch. 20). Bronson, J., in *Sackett v. Andross*, 5 Hill,

¹ "If a man is taken in execution, and lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes, but he must live on his own or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law, and so say I." Hyde, Justice, in *Many v. Scott*, 1 Mod. 132 (A. D. 1668.)

327, 349. This act was confined to such debtors as were in prison upon a day specified in the act. The debtor was discharged from imprisonment, but the debt could still be enforced against his property, and the creditor might, if he chose, still retain him in custody by paying a small stipend for his support. This act was followed by many others of a similar character, passed for the purpose of relieving the crowded condition of the jails, and at such intervals as the caprice of parliament dictated.¹ At the time of our revolution it is said that there were not less than thirty British statutes on the subject. Bronson, J., in *Sackett v. Andross*, 5 Hill, 327, 349.

In 1697 the experiment appears to have been tried of discharging the debtor by means of a composition upon consent of two-thirds in number and value of his creditors (8 & 9 Wm. 3, c. 18), but the result seems to have been unsatisfactory, and the act was repealed the next year (9 & 10 Wm. 3, c. 29).

The first general and permanent statute was that of 32 Geo. 2, c. 28, commonly called the Lord's Act, from the circumstance of its having originated in the House of Lords. Relief was limited to prisoners actually in custody upon executions for debts under £100 (afterwards extended to £200, 33 Geo. 3, c. 5). It was upon this act that our statute for the relief of debtors, with respect to the imprisonment of their persons, was modelled. McCoun, V. C., in *Van Wezel v. Van Wezel*, 3 Paige, 37, 41.

In all insolvent acts, down to 1774, a power was given to take in execution for any former debt the future effects of the insolvent, but this clause was omitted in 14, 16 & 18, Geo. 3, where it was provided that only real estate or money in the funds acquired after such discharge should be liable for former debts. *Mason v. Vere*, 2 Wm. B. 1310, Blackstone, J. In 1813 (53 Geo. 3, c. 102), a general system was provided for the discharge of all imprisoned debtors who had been in actual cus-

¹ Among them are the following: 6 Geo. 1, c. 22; 11 Geo. 1, c. 21; 2 Geo. 2, c. 21; 2 Id. c. 22; 3 Id. c. 27; 10 Id. c. 26; 11 Id. c. 9; 16 Id. c. 17; 21 Id. c. 31; 28 Id. c. 13; 29 Id. c. 18; 1 Geo. 3, c. 17; 2 Id. c. 2; 5 Id. c. 41; 9 Id. c. 26; 14 Id. c. 77; 18 Id. c. 52; 21 Id. c. 85; 41 Id. c. 70; 44 Id. c. 108; 45 Id. c. 3; 46 Id. c. 108; 51 Id. c. 125; 53 Id. c. 102; 1 Geo. 4, c. 119; 7 Id. c. 57; 1 Wm. 4, c. 38.

tody for three months, upon a full surrender of their property, and the court for the relief of insolvent debtors was established. Under this act a contingent discharge was granted as to the insolvent's debts. The court was authorized to enter up a judgment against the insolvent in favor of all his creditors, and that judgment could be enforced on application to the court, showing that the debtor had subsequently become able to pay; the object being not only to obtain an equal distribution of the debtor's present estate, but also of his future acquisitions. *Baker v. Sydee*, 7 Taunt. 179; see *Carpenter v. White*, 3 J. B. Moore, 231. This act, which expired by limitation, was followed by 1 Geo. 4, c. 119; 7 Geo. 4, c. 57; 11 Geo. 4, and 1 Wm. 4, c. 38, all of which contained the same general features. In 1838 (1 & 2 Vict. c. 110), arrest upon *mesne* process for debts exceeding £20 was abolished, except in cases where proof was made of the intention of the defendant to leave England. Provision was also made for discharge from liability to imprisonment on final process upon the surrender by the debtor of all his property. By subsequent statutes (5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96), this legislation was still further extended. In 1861 (24 & 25 Vict. c. 134), the court for the relief of insolvent debtors was abolished; the bankrupt law was extended to non-traders as well as traders, and the original distinction between the insolvent and bankrupt systems became substantially obliterated.

§ 4. *Insolvent legislation in the State of New York.*—Except for a brief interval (from 1770 to 1784), insolvent acts have uniformly existed in the State of New York ever since it was an independent government. *Mather v. Bush*, 16 Johns. 233, 234. These acts have been both bankrupt and insolvent laws. They have discharged the debtor from his debts, and have also relieved his person from imprisonment. A general act for the relief of insolvent debtors, permitting the debtor, in conjunction with three-fourths of his creditors, to petition for his discharge from his debts existed in the colony of New York from 1761 to 1770. Smith & Livingston's Ed. of Laws, vol. 2, pp. 62, 216; Van Schaick's Ed. vol. 1, pp. 348, 392; Jones & Varick's Ed. vol. 1, p. 131; Id. vol. 2, p. 315.

A similar act was passed by the State Legislature in April, 1784, which was at various times amended, and on March 21, 1788 (2 Greenl. 204), was passed the act commonly called the three-fourths act, which was revised April 3, 1801 (1 K. & R. 428), and continued in force until the act of April 3, 1811 (6 Web. 200), by which a debtor was discharged from his debts on his own petition merely, and on the surrender of his property without the concurrence or consent of any of his creditors.¹ This act did not continue for a year, but was repealed by the act of February 14, 1812 (6 Web. 349), and the act of 1801 thereupon revived and continued in force until the revision of the laws in 1813, when the act of April 3, 1813 (1 R. L. 460), was passed, allowing an insolvent debtor, in conjunction with two-thirds of his creditors, to petition for a discharge. This act was amended from time to time, and by the act of February 17, 1817 (Laws of 1817, c. 55), provisions were inserted for proceedings by creditors to compel assignments by debtors imprisoned on execution. This act was fully revised and incorporated into the Revised Statutes of 1830; that portion of it relating to the discharge of a debtor on his petition, in conjunction with two-thirds in amount of his creditors forming the third article of chapter six, of title one, of part two, and the portion relating to compulsory proceedings on the part of creditors forming the fourth article of the same chapter. These articles are considered in detail hereafter.

The other class of statutes, more strictly denominated insolvent laws, which furnished relief to debtors with respect to the imprisonment of their persons, have also existed in this State from an early time. The act of February 13, 1789 (2 Greenl. 231), as

¹ It was this act which was declared unconstitutional as to debts contracted before its passage in the famous case of *Sturgis v. Crowninshield* (4 Wheat. 122). Of this act Chan. Kent says (*Hicks v. Hotchkiss*, 7 Johns. Ch. 293, 303): "There never was an act that held out more alluring and more dangerous temptations to debtors to forget what they owed to good faith, and to disregard the moral obligation of contracts. The evils of it were contagious and spread like a pestilence. The public became alarmed, and wise and good men, and men of property, were deeply excited. Petitions for the repeal of the act flowed in from every quarter to the next Legislature, and it was one of the first acts of the session of 1812 (Sess. 35, ch. 8) to abolish the law of the preceding year, without waiting to prepare another and better system in its stead."

amended March 10, 1791 (2 Greenl. 355), usually called the £1,000 Act, was framed upon the basis of the English statute of 32 Geo. 2, c. 28. It provided a system for the discharge of debtors imprisoned on execution for an amount not exceeding £1,000, upon their executing an assignment of their property for the benefit of the creditors who have charged them in execution. This act remained in force until the revision of 1813, when the act of April 9, 1813 (1 Laws of 1813, ch. 81), was passed. By this act debtors charged in execution for a sum less than \$500, and such as were held on execution for an amount exceeding that sum, who had been imprisoned for three months, became entitled to a discharge upon terms similar to those prescribed in the previous act.

In 1819 (Laws of 1819, ch. 101), was passed what was entitled "An Act to abolish imprisonment for debt in certain cases." That act provided for the exoneration of insolvent debtors from arrest or imprisonment on debts arising *ex contractu*, upon a surrender of all their property for the benefit of all their creditors. The Revised Statutes have retained the substance of each of these enactments. The act of 1819 is incorporated in the provisions of article five, of title one, of chapter five, of part two, providing for voluntary assignments by an insolvent, for the purpose of exonerating his person from imprisonment; while the sixth article of the same title contains the substantial requirements of the act of April 9, 1813, and provides for voluntary assignments by a debtor imprisoned in execution in civil causes. Each of these articles form a portion of the subject-matter of the present work.

§ 5. *The right of the State to legislate on the subject of bankruptcy and insolvency.*—The Constitution of the United States provides that Congress shall have power to establish uniform laws upon the subject of bankruptcies throughout the United States. It was contended for the first time, in the case of *Sturgis v. Crowninshield* (4 Wheat. 122 [A. D. 1819]), that this grant of power to Congress was exclusive, and that no State had authority to pass a bankrupt law. This position was not sustained; on the contrary, the law was declared to be "that, since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided

such law does not impair the obligation of contracts within the meaning of the Constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law." And this position has ever since remained unquestioned. *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacherie*, 6 Pet. 638; Cooley Cons. Lim. 294.

Some conflict of opinion has existed as to the extent and limit of the proviso to the rule, when Congress has exercised its constitutional power and established a bankrupt law. This question came before Mr. Justice Story, in *Ex parte Eames* (2 Story, 322), after the passage of the bankrupt act of 1841, and he there held that the insolvent laws of a State, as to persons and cases within the provisions of the bankrupt act, were completely suspended. In that case, however, the insolvent had filed his petition in bankruptcy. *Griswold v. Pratt* (9 Metc. [Mass.], 16), went further. It was there held that when a United States bankrupt act was in force, if the debtor and his property were subject to the operation of that act, proceedings against him under the State insolvent laws were unauthorized and void, and that the actual institution of proceedings in bankruptcy was not necessary to produce that result. And this opinion is supported by abundant authority. *In re Reynolds*, 1 N. B. R. 50; *Shears v. Solhinger*, 10 Abb. Pr. N. S. 287; *Blanchard v. Russell*, 13 Mass. 1; *Day v. Bardwell*, 97 Mass. 246; *Van Nostrand v. Barr*, 2 N. B. R. 485; *Larreebee v. Talbot*, 5 Gill (Md.), 426; *Matter of Reynolds*, 8 R. I. 485. In *Meekins v. Creditors* (19 La. Ann. 497), it is stated broadly that the legal effect of the exercise by Congress of the power vested in it by the Constitution is to repeal the insolvent laws of each particular State.

In opposition to these views, it has been declared by the courts of several of the States that the effect of the enactment of a Federal bankrupt law is not to annul or to wholly suspend the insolvent laws of the several States, but to limit their operation to such cases as were not actually brought within the operation of the National act. *Reed v. Taylor*, 32 Iowa, 209; *Geery's Appeal*, 43 Conn. 289; *Ex parte Zergenfuss*, 24 N. C. 463; *Shyrock v. Bushore*, 13 N. B. R. 481; *Shepherdson's Appeal*, 36 Conn. 28; *Hawkin's Appeal*, 34 Conn. 548; *Beck v. Parker*, 65 Penn. St. 262; *Barber v. Rogers*, 71 Penn. St. 362.

The conflict of opinion, however, extends only to such State insolvent laws as discharge the debt, and are therefore strictly bankrupt laws. Laws which relieve the debtor from imprisonment merely, leaving the creditor at liberty to pursue his property, are not inconsistent with the exercise by Congress of its constitutional authority over the subject of bankruptcies. *Sturgis v. Crowninshield*, 4 Wheat. 122; *Mason v. Haile*, 12 Id. 370; *In re Jacobs*, 12 Abb. Pr. N. S. 273; *Shears v. Solhinger*, 10 Id. 287; *Donnelly v. Corbett*, 7 N. Y. 500; *Woodhull v. Wagner*, Bald. 296.

§ 6. *When State insolvent laws impair the obligation of the contract.*—A further objection has been taken to the enactment of State insolvent laws, upon the ground that such laws impair the obligation of contracts, and are, consequently, repugnant to that provision of the Constitution of the United States which prohibits a State from passing such laws. This question was elaborately argued in the Supreme Court of the United States, in *Sturgis v. Crowninshield* (4 Wheat. 122), and in *Ogden v. Saunders* (12 Wheat. 213). The decision of that court, which has ever since been regarded as final, was, that such laws were valid as to contracts made subsequently to the enactment of the law, because, being made after the law, the parties were presumed to have had reference to the law, and impliedly to have made it part of the contract; but as to contracts entered into before the passage of the act, a discharge under a State insolvent law was wholly inoperative. Whatever may be said of the grounds upon which the decision was placed (see remarks of Gardiner, J., in *Donnelly v. Corbett*, 7 N. Y. 500, 505; and see *Olyphant v. Atwood*, 4 Bosw. 459, 470; *In re Reiman & Friedlander*, 11 N. B. R. 21), the rule is now so well settled as to be beyond question. *Sturgis v. Crowninshield*, *supra*; *Ogden v. Saunders*, *supra*; *Cook v. Moffat*, 5 How. U. S. 309; *Boyle v. Zacherie*, 6 Pet. 348; *Wyman v. Mitchell*, 1 Cow. 316, 321; *Mather v. Bush*, 16 Johns. 233; *Roosevelt v. Cebra*, 17 Id. 108; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Pratt v. Chase*, 44 N. Y. 597.

Insolvent laws which merely release the debtor from imprisonment or from liability to arrest, effect the remedy only,

and are open to no constitutional objection. "Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." *Sturgis v. Crowninshield*, 4 Wheat. 112, 200. And it is quite immaterial whether the debt was contracted before or after the law was passed. *Mason v. Haile*, 12 Wheat. 370; *Beers v. Houghton*, 9 Pet. 329; *In re Jacobs*, Abb. Pr. N. S. 273.

The question as to how far State insolvent laws are operative against citizens of other States, and what, if any, extra-territorial effect can be given to them, is reserved for consideration in another place (see Chap. IV).

§ 7. *General assignments for creditors*.—Apart from the statutory proceedings which have been mentioned, by which a debtor may seek relief from the burden of his debts, or free himself from the extreme enforcement of them against his person, the common law permits a failing debtor to place his property beyond the direct pursuit of creditors by a conveyance of it to an assignee in trust for his creditors. Such conveyance may be made to furnish a speedy and economical method for the distribution of a debtor's estate among those who are justly entitled to it. They do not, however, afford any direct relief to the debtor. The dividends paid to creditors amount only to a payment *pro tanto*, and the debtor is still liable to legal process as before. *Butler v. Thompson*, 4 Abb. N. C. 290. Under the well-established rules of common law they do, however, furnish a method by which an insolvent debtor may make payment of such debts as he may choose to prefer, to the exclusion of those who might otherwise obtain a priority (see Chap. XII, Preferences). They afford an opportunity also for creditors, if they are so disposed, to make an amicable settlement with their debtor, while his property is protected from seizure, by any individual creditor. Beyond these advantages an honest general assignment can work no benefit to a debtor.

Under the insolvent laws, as we shall see, the debtor's property remains in him until after an assignment is ordered. The preliminaries to obtaining such an order, if the requisite number of creditors is obtained, may necessarily occupy so long a

time, that before the property is divested from the debtor, diligent creditors may have exhausted the estate.

A failing debtor, therefore, who desires an equal distribution of his estate among his creditors, has, in the absence of a National bankrupt law, as a general rule, no choice but to execute a general assignment, and such conveyances have been the usual resort of failing debtors in this State for many years. The method of making such assignments and of administering the trusts created by them was first regulated by statute in 1860 (Laws of 1860, ch. 348). That act was several times amended, and finally repealed and replaced by the general assignment act of 1877 (Laws of 1877, ch. 466, amended by Laws of 1878, ch. 318). Both the statute and common law relating to these instruments, and the rights and duties created by them are discussed in the following pages.

§ 8. *Division of the subject.*—The subject of the present work is divided in the following manner: Part I treats of the proceedings for the discharge of an insolvent debtor from his debts, commonly called the “Two-third Act,” being article three, of title one, of chapter five, of part two of the Revised Statutes.¹ Part II presents the proceedings for compelling assignments by imprisoned debtors, and for the exoneration of an insolvent debtor from arrest, and the discharge of such debtors from imprisonment on execution in civil actions, being articles four, five and six of the same chapter. Part III treats of the execution and validity of general assignments and the provisions of the general assignment law of 1877. Part IV deals with the administration of the insolvent’s estate, assigned under either of the previous proceedings. This includes a consideration of the provisions of article eight, of the chapter of the Revised Statutes to which we have before alluded. Part V discusses the rules of common law in reference to composition deeds and compositions between a debtor and his creditors, and releases by creditors.

¹ The first article of chapter five, relating to attachments against absconding, concealed and non-resident debtors, has been repealed (Laws of 1877, ch. 417). The second article, “Of attachments against debtors confined for crime,” although in force, does not properly fall within the limits of this work.

PART I.

PROCEEDINGS OF INSOLVENT DEBTORS TO OBTAIN A DISCHARGE FROM THEIR DEBTS.

THE TWO-THIRD ACT.

(R. S. Part II, Ch. 5, Title 1, Art. 3.)

CHAPTER II.

COMMENCEMENT OF PROCEEDINGS — PETITION — SCHEDULE AND AFFIDAVITS.

§ 9. *In general.*—The proceedings of insolvent debtors to obtain a discharge from their debts are wholly statutory. The provisions in reference to them are embraced in the Revised Statutes, part two, chapter five, title one, article three (see *ante*, § 4). It is a special proceeding originating in a petition and terminating in an order. The judicial authority to entertain this class of proceedings is conferred upon certain specified officers (see *post*, § 26), and the jurisdiction which they acquire is a special and limited jurisdiction determined by the statute. Hence the general rule which commands that an officer exercising a special authority conferred by statute must act strictly within the authority, is applicable at every stage of the proceeding. If the officer acts without authority, or in excess of his power, his acts are void. He cannot acquire jurisdiction by deciding that he has it. When his right to act depends upon the existence of a prescribed fact, the fact must exist or his power is wanting. *Morrow v. Freeman*, 61 N. Y. 515; *Nat. Bk. of Chemung v. City of Elmira*, 53 N. Y. 49, 53; *People v. Stryker*, 24 Barb. 649; *Merry v.*

Sweet, 53 Barb. 475; s. c. as *Hale v. Sweet*, 40 N. Y. 97; *Stanton v. Ellis*, 12 N. Y. 575.

Want of jurisdiction, if it exists, is a radical defect. It is available at all times and in all places, either in the proceeding itself, or in any collateral proceeding. *Small v. Wheaton*, 2 Abb. Pr. 175, 178.

As a rule of construction, it is said by Chan. Walworth (*Salters v. Tobias*, 3 Paige, 339, 345), that statutes of this description, which are intended to deprive the creditor of all remedy for the recovery of an honest debt, must be construed strictly, and should not be extended by implication beyond the fair and legitimate meaning of the terms used by the Legislature.

§ 10. *Who may be discharged*.—"Every insolvent debtor may be discharged from his debts as hereinafter provided, upon executing an assignment of all his estate for the benefit of his creditors, and upon the provisions of this article being complied with." 2 R. S. 16, § 1; 3 R. S. 6th ed. 13, § 1; 2 Edm. 17; 1 Fay's Dig. 368.

This provision is very general in its terms. It is limited, however, by a subsequent section (2 R. S. 35, § 2; see *post*, § 27), to such insolvent debtors as reside in the county in which the application is made. A foreigner who has abandoned his residence in this State and removed to his home, cannot, by a return of a temporary character merely, acquire the right to a discharge under this article. *Matter of Wrigley*, 4 Wend. 602; *aff'd* 8 Id. 134. The residence required by the statute does not, however, require that a person should have a legal domicile in the State. It is enough if he have a fixed and permanent abode here, as distinguished from a mere temporary locality of existence. *Matter of Wrigley*, *supra*; see *Roosevelt v. Kellogg*, 20 Johns. 208, 210.

The fact of residence is one that must exist, and must be shown in the manner hereafter pointed out (*post*, § 32). *Otis v. Hitchcock*, 6 Wend. 433; *Jenks v. Stebbins*, 11 Johns. 224; *People ex rel. Pacific Mut. Ins. Co. v. Machado*, 16 Abb. Pr. 451; *Morewood v. Hollister*, 6 N. Y. 309, 316.

An insolvent debtor who has given a preference contrary

to the provisions of the act (*post*, § 49), is debarred from obtaining a discharge. See *Morewood v. Hollister*, 6 N. Y. 309.

§ 11. *The petition and petitioners*.—"The petition for that purpose shall be signed by him, and by so many of his creditors residing within the United States as have debts in good faith owing to them by such debtor, then due or thereafter to become due, and amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States." 2 R. S. 16, § 2; 3 R. S. 6th ed. 13, § 2; 2 Edm. 17; 1 Fay's Dig. 368.

§ 12. *The requisite number*.—The petition must be signed by two-thirds in amount of the creditors residing within the United States. This is a jurisdictional fact. In the case of *Morrow v. Freeman* (61 N. Y. 515), where the authorities were fully reviewed by Commissioner Dwight, it was held that where it appeared on the face of the proceedings that less than two-thirds of the creditors had joined in the petition, the officer before whom the proceeding was had was without jurisdiction, and the discharge granted to the debtor was void. See *Frery v. Dakin*, 7 Johns. 75. In several cases previously decided it was thought that the question of whether the requisite number had joined was one to be determined solely upon the hearing, and if then found in favor of the debtor, it was conclusive in the absence of fraud. *Matter of Bradstreet*, 13 Johns. 385; *Emberson's Case*, 14 Abb. Pr. 457; *Small v. Graves*, 7 Barb. 576; *Ayres v. Scribner*, 17 Wend. 407; *Betts v. Bagley*, 12 Pick. 572.

In the case of *Rusher v. Sherman* (28 Barb. 416), names were signed to the petition, without any amount set opposite to them, but these persons were not named in the schedule as creditors, it was held that they were not to be regarded as creditors.

§ 13. *Foreign petitioners*.—Under the act of 1813 it was necessary, as under the present statute, that two-thirds of the creditors residing in the United States should join in the petition. *Salters v. Tobias*, 3 Paige, 338. The act of February 28, 1817 (Laws of 1817, ch. 55, § 10), permitted foreign as

well as domestic creditors to petition, and to be taken into the estimate in computing the requisite two-thirds. The Revised Statutes have restored to the act of 1813, in this respect, by inserting the last clause of this section. The revisors, in their note to this section, say: "The whole current of authorities on these laws settles beyond dispute, that foreign creditors cannot be effected by a discharge, without their consent. It is therefore proposed to omit the provisions respecting them; and as their debts cannot be taken into account, in respect to the effect of the discharge, they ought not to be regarded in determining the number of petitioning creditors."

§ 14. *Form of the petition.*—The form of the petition is not prescribed by the statute. It should contain a statement of all the jurisdictional facts. It should be addressed to the officer before whom it is intended to institute the proceedings. It should show that the debtor is a resident of the county in which such officer resides (*Russell & Erwin Mfg. Co. v. Armstrong*, 12 Abb. Pr. 472; aff'g 10 Id. 258, note), and that he is insolvent. It is proper, also, that it should state the residences of the petitioning creditors, and the fact that such petitioning creditors have debts in good faith owing to them by such debtor, then due or thereafter to become due, and amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States, although the schedule of the debtor and the affidavits of the petitioning creditors which are required to be annexed to the petition, must show these facts with the particularity prescribed by the following sections. The petition should also state that the debtor and petitioning creditors are desirous that the debtor's estate should be distributed among his creditors in payment of his debts, so far as the same will extend. It is usual, also, for the petitioning creditors to nominate in the petition the assignee or assignees to whom they desire that the assignment should be made. 2 R. S. § 27; see *post*, § 52. The selection is made by a majority in amount of the petitioning creditors, and no method is provided by the statute in which the choice is to be made. The prayer of the petition should be that the debtor may be discharged from his debts, pursuant to this article.

§ 15. *Executors and administrators.*—"Executors and administrators may become petitioning creditors for the discharge of an insolvent, under the order of the surrogate, to whom they may be liable to account, or of a justice of the Supreme Court having jurisdiction; and shall be chargeable only for such sum as they shall actually receive on the dividend of the insolvent estate." 2 R. S. 16, § 3, as modified by Laws of 1847, ch. 280, § 16; 3 R. S. 6th ed. 13, § 3; 2 Edm. 17; 1 Fay's Dig. 369.

§ 16. *Copartnership creditors.*—"Any creditor or creditors of any copartnership firm, or of any joint debtors, may unite with any one or more of the members of any such copartnership firm, or with any one or more of any such joint debtors, in a petition for the discharge of such partner or partners, joint debtor or debtors, from his or their debts, under and in accordance with the provisions of article third, of title one, of chapter five, of part two of the Revised Statutes, and the discharge of any partner or partners, joint debtor or debtors, in consequence of any such petition, shall have the same force and effect as the note or memorandum in writing mentioned in the act hereby amended, and shall not discharge any copartner or joint debtor, except such copartner and joint debtor as may be designated by the petitioning creditors." Laws of 1849, ch. 176; 3 R. S. 6th ed. 13, § 4; 4 Edm. 451.

"Whenever partners or joint companies are creditors of any debtor, any petition and any affidavit required by the preceding articles, of creditors, may be made and signed by either of the partners, or any one of such company." 2 R. S. 36, § 8; 3 R. S. 6th ed. 29, § 8; 2 Edm. 37; 1 Fay's Dig. 383.

§ 17. *Trustees, receivers and assignees.*—"Trustees, receivers and assignees of the estate of any creditor of an insolvent, whether created by operation of law or by the act of parties, may become petitioning creditors for the discharge of an insolvent under the third article, title one, chapter five and part second of the Revised Statutes, under the order of a justice of the Supreme Court; and shall be chargeable only for such sum as they shall actually receive on the dividend of the insolvent

estate." Laws of 1850, ch. 210, § 1; 3 R. S. 6th ed. 14, § 5; 4 Edm. 482; 1 Fay's Dig. 373.

Previous to the enactment of this section it was held that a mere naked trustee, without interest, could not become a petitioning creditor without the consent of his *cestui que trust*. *Matter of Sherryd*, 2 Paige, 602.

"Such trustees, receivers or assignees, shall make and annex to their petition the affidavit which is required to be made by other petitioning creditors by the fourth section of the said third article, except that they may state in such affidavit the nature of the demand in respect to which they become petitioning creditors, and whether arising on any written security or otherwise, with the general ground and consideration of such indebtedness or information and belief, setting forth the grounds of their belief, and their affidavit shall be accompanied by the affidavit of the insolvent, as to all matters which are so stated on information and belief." Laws of 1850, ch. 210, § 2; 3 R. S. 6th ed. 14, § 6; 4 Edm. 482; 1 Fay's Dig. 373.

§ 18. *Corporations*.—"A corporation shall be deemed a creditor within the meaning of all the provisions of this title; and may present or unite in any petition, as other creditors, under either of the preceding articles.¹ Any such petition may be signed by a director or other officer of the corporation thereto duly authorized under its common seal; and any affidavit required of creditors by the preceding articles, may be made and signed by such director or officer." 2 R. S. 36, § 7; 3 R. S. 6th ed. 29, § 7; 2 Edm. 37; 1 Fay's Dig. 382.

§ 19. *Non-resident creditors*.—"Creditors residing out of this State, and within the United States, may petition and unite in any petition in the same manner as resident creditors, under either of the preceding articles.² They shall annex to every such petition the original accounts or sworn copies, and the original specialties or written securities, if any, on which their demands arise or depend. Affidavits sworn to by them before a judge or

¹ The articles referred to, included in this work, are incorporated in Chapters V, VI and VII, *post*.

² *Ibid*.

clerk of a court of record of the State, district, or territory in which they reside, duly authenticated under the seal of such court, shall be received by every officer or court, in proceedings under this title, in the same manner as if such affidavits were made before a proper officer in this State." 2 R. S. 36, § 9; 3 R. S. 3d ed. 29, § 9; 2 Edm. 37; 1 Fay's Dig. 383.

Where a partnership is a creditor, its place of business being within the State, and its business being controlled and managed by the creditors who reside here, it seems that the partnership may be a petitioning creditor, although one of the members of the firm resides out of the United States. *Renard v. Hargous*, 2 Duer, 540; aff'd 13 N. Y. 259.

In *Warrin's Case* (16 Abb. Pr. 457, note), where the only petitioning creditor was a non-resident who held notes of the debtor given for the purchase-money of merchandise, and neither the original notes nor sworn copies of the notes or accounts were annexed to the petition, it was held that the annexing of the originals or sworn copies was essential to confer jurisdiction, and that the omission could not be supplied so as to give validity to the proceedings.

§ 20. *Creditors holding assigned claims.*—"Wherever a petitioning creditor under either of the foregoing articles¹ shall have purchased or procured to be assigned to him, any debt or demand against the debtor in respect to whom, or whose estate, he is a petitioner, for less than the nominal amount of such debt or demand, and whenever any executor or administrator shall petition in respect to any such debt or demand, the person petitioning shall be deemed a creditor to the amount only of the sum or value actually and in good faith paid by him, or by his testator or intestate, for such debt or demand." 2 R. S. 36, § 10; 3 R. S. 6th ed. 29, § 10; 2 Edm. 37; 1 Fay's Dig. 383.

Where the insolvent procured his clerk to purchase from one of the creditors a judgment for a large sum upon a nominal consideration, which was, in fact, never paid, and the clerk became a petitioning creditor for the full amount of the judg-

¹ The articles referred to, included in this work, are incorporated in Chapters V, VI and VII, *post*.

ment, it was held that this fact was sufficient to avoid the discharge without proof of actual fraud. *Slidell v. McCrea*, 1 Wend. 156.

And the fact that a creditor who has bought a demand against the insolvent, knowing him to be such, at a discount, sees fit to prosecute it and recover a judgment upon it, although valid as against the debtor for the whole amount, does not take him out of this section in respect to his position as a petitioning creditor. *Emberson's Case*, 16 Abb. Pr. 457.

But where the petitioning creditor had purchased the claim several years before the insolvent proceedings were instituted, and there was no evidence that the debtor procured the creditor to prove the claim for an amount larger than the amount actually due, it was not regarded as a ground to avoid the discharge that the creditor proved the claim at its face, and not for the amount which he had paid. *Small v. Graves*, 7 Barb. 576.

§ 21. *Secured creditors*.—"Whenever a petitioning creditor under the first,¹ second,² third, or fourth³ articles of this title shall have in his own name or in trust for him, any mortgage, judgment or other security, or assignment by way of security, for securing the payment of any sum of money upon any real or personal estate of the debtor in respect to whom or whose estate he is petitioner, he shall not become a petitioner in respect to the debt so secured, unless he shall add to his signature to the petition a declaration in writing that he relinquishes to the assignees or trustees who shall be appointed pursuant to such petition, every such mortgage, judgment or other security for the benefit of all the creditors of such debtor; which declaration shall operate as an assignment of such mortgage, judgment or security, to the assignee or trustees who shall be subsequently appointed under the proceedings upon such petition, and vest in them all the rights and interest of such petitioning creditor therein." 2 R. S. 63, § 11; 3 R. S. 6th ed. 30, § 11; 2 Edm. 37; 1 Fay's Dig. 383.

¹ This article has been repealed. Laws of 1877, ch. 417.

² 2 R. S. Part 2, Chap. 5, Title 1, Art. 2.

³ See *post*, Chapter V.

The form in which the release to the assignee should be made, is not prescribed by the statute. A substantial compliance with the statute is all that is required. *Augsbury v. Crossman*, 17 Supm. Ct. (10 Hun), 389, 396. Where the declaration attached to the creditors signature was as follows: "For value received I hereby release to the assignee to be appointed, all claims on the estate of C. C., that I have by reason of the judgment against him assigned to me;" this was regarded as a sufficient compliance with the statute. *Augsbury v. Crossman*, *supra*.

A compliance with this section appears to be essential when, ever the secured claim is necessary to make up the required two-thirds. In *Morewood v. Hollister* (6 N. Y. 309), it was determined that when the petitioning creditors who held collateral securities for any part of the debts due them, neglected to sign a declaration of relinquishment of such securities, they could not be regarded as petitioning creditors on account of the debts so secured, and when, after rejecting such debts less than two-thirds in amount of the creditors of the insolvent as shown by the petition, had joined in signing and presenting it, the officer to whom it was presented obtained no jurisdiction to grant a discharge. See opinion of James, J., in *Hale v. Sweet*, 40 N. Y. 97, 102 (dissenting on another ground), and see *Augsbury v. Crossman*, 17 Supm. Ct. (10 Hun), 389.

But in the *Matter of Phillips* (43 Barb. 108; s. c. 19 Abb. Pr. 281), it was held that where certain of the petitioning creditors were judgment debtors, and did not at the time of signing the petition, add to their signatures a declaration that they relinquished such judgment to the assignees to be appointed, though such relinquishment was subsequently, and before any further proceedings by the judge, obtained and attached to the petition, the omission was a mere irregularity, and was cured. And see *Russell & Erwin Mfg. Co. v. Armstrong* (12 Abb. Pr. 472; affi'g 10 Id. 258, note), and remarks of Hunt, Ch. J., in *Soule v. Chase* (39 N. Y. 342, 345; s. c. 1 Abb. Pr. N. S. 48).

The creditor is required to surrender only such liens and securities as he has upon the estate and property of the debtor, and when the creditor has obtained a joint judgment against the insolvent and another, the release of the judgment to the

assignee of the insolvent does not affect the claim of the creditor against the other judgment debtor. *Elsworth v. Caldwell*, 48 N. Y. 680; aff'g 18 Abb. Pr. 20; s. o. 27 How. 188.

§ 22. *Execution creditor*.—A creditor who has the body of his debtor in execution, cannot be a petitioning creditor. *Beaty v. Beaty*, 2 Johns. Ch. 430; citing *Burnaby's Case*, Str. 653; *Cohen v. Cunningham*, 8 Term R. 123; *Ex parte Cundall*, 6 Ves. 446; *Ex parte Arundel*, 18 Ves. 231. A sufficient reason for this rule is, that the imprisonment of the judgment debtor on execution, is in law a satisfaction of the judgment as long as the imprisonment continues. *König v. Steckel*, 58 N. Y. 475.

§ 23. *Affidavits of petitioning creditors*.—"Every such petition shall be accompanied by the affidavit of each petitioning creditor, to be taken before any officer authorized to take affidavits to be read in courts of record; which affidavit shall state, that the sum specified therein and annexed to the name of the petitioner subscribed to such petition, is justly due to him, or will become due to him at some future time to be specified therein; and shall state the nature of the demand, and whether arising on any written security or otherwise, with the general ground and consideration of such indebtedness, and that neither he, nor any person to his use, hath received from such insolvent, or any other person, payment of any demand or any part thereof, in money or in any other way whatever, or any gift or reward whatsoever, upon any express or implied trust or confidence, that he should become a petitioner for such insolvent." 2 R. S. 16, § 4; 3 R. S. 6th ed. 14, § 7; 2 Edm. 17; 1 Fay's Dig. 369.

When a corporation is a creditor, the affidavit required by the statute may be made and signed by a director or other duly authorized officer. (See *supra*, § 18.)

And if partners or joint companies are creditors, the petition may be made and signed by either of the partners or any one of such company. (See *supra*, § 16.)

Creditors residing out of this State and within the United States, may make affidavit before a judge or clerk of a court of

record of the State, district, or territory in which they reside, duly authenticated under the seal of such court, which shall be received in these proceedings in the same manner as if made before a proper officer in this State. (See *supra*, § 19.)

In *Rusher v. Sherman* (28 Barb. 416), the affidavits of three of the petitioning creditors were sworn to before a New York commissioner residing in Connecticut. No certificate of the Secretary of State, as required by Laws of 1850, p. 582, was annexed to the affidavit to prove that the person administering the oath was, in fact, a commissioner for this State. The court held that the want of such certificate was not a jurisdictional defect, but one that was cured by the discharge, and it seems that the jurisdiction of the officer may be shown upon the hearing by parol proof.

When trustees, receivers, or assignees are petitioning creditors, they must make the affidavit required by this section, except that they may make affidavit on information and belief, setting forth the grounds of their belief, and their affidavit must be accompanied by an affidavit of the insolvent, as to all matters which are so stated on information and belief. (See *supra*, § 17.)

Whenever partners or joint companies are creditors of any debtor, any petition and any affidavit required by the preceding articles, of creditors, may be made and signed by either of the partners, or any one of such company. 2 R. S. 36, § 8; 3 R. S. 6th ed. 29, § 8; 2 Edm. 37; 1 Fay's Dig. 383.

The affidavit should state :

(1.) The sum due the petitioner (being the sum annexed to the name of the petitioner, subscribed to the petition).

(2.) That said sum is justly due to him, or that it will become due at a specified date.

(3.) The nature of the demand, and whether arising on any written security or otherwise.

(4.) The general ground and consideration of the indebtedness.

(5.) That neither the petitioner nor any person to his use hath received, from such insolvent or any other person, payment of any demand or any part thereof, in money or in any other way whatever, or any gift or reward whatsoever, upon any ex-

press or implied trust or confidence, that he should become a petitioner for such insolvent.

It is important that the affidavit should comply with the requirements of the statute, otherwise the claim of the petitioner may be disregarded, and if his claim is necessary to make up the requisite two-thirds, the officer will acquire no jurisdiction. *Gillies v. Crawford*, 2 Hilt. 338. Thus, in the case last cited, the affidavit of one of the petitioning creditors stated simply that the sum annexed to his name was justly due to him from the insolvent, for two promissory notes, one of \$2,000 and one of \$2,550 91. This was held to be fatally defective, as not stating the nature of the demand with the general ground and consideration of the indebtedness. So when the affidavit was in the following words: "That the sum of \$223 subscribed to the petition of E. C., an insolvent debtor, hereto annexed, is justly due to this deponent from the said insolvent, on a note of hand, given by the said E. C. to this deponent, on a settlement of accounts between," it was held that the nature of the account, or the general ground of the indebtedness, ought to be set forth in the affidavit. *Matter of Cook*, 15 Johns. 182. So in another case, where the affidavit of one creditor specified the indebtedness to be "on account of judgment entered against said insolvent, justly due to him from said insolvent," and another creditor specified his indebtedness to be on account of a judgment entered against said insolvent upon a promissory note, it was held that in neither of these cases did the affidavits comply with the requirements of the statute. *Merry v. Sweet*, 53 Barb. 475; *aff'd*, *Hale v. Sweet*, 40 N. Y. 97; and see also *Slidell v. McCrea*, 1 Wend. 156; *McNair v. Gilbert*, 3 Wend. 344; *Stanton v. Ellis*, 12 N. Y. 575; *Taylor v. Williams*, 20 Johns. 22; *Rusher v. Sherman*, 28 Barb. 416.

§ 24. *The insolvent's schedule.*—"Every such insolvent shall annex to and deliver with his petition, to the officer to whom it shall be presented, a schedule containing:

"1. A full and true account of all his creditors.

"2. The place of residence of each creditor, if known to such insolvent; and if not known, the fact to be so stated.

"3. The sum owing to each creditor, and the nature of each

debt or demand, whether arising on written security, on account, or otherwise.

“4. The true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.

“5. A statement of any existing judgment, mortgage or collateral or other security, for the payment of any such debt.

“6. A full and true inventory of all the estate, both real and personal, in law and equity, of such insolvent, of the incumbrances existing thereon, and of all the books, vouchers and securities relating thereto.” 2 R. S. 17, § 5; 3 R. S. 6th ed. 14, § 8; 2 Edm. 18; 1 Fay's Dig. 369.

The schedule should specify the debts with certainty. *Stanton v. Ellis*, 12 N. Y. 575. And where the name of the creditor was stated in the schedule, and the ground of the indebtedness set forth, but the amount of the debt was left blank, it was held that the defect was fatal and the officer failed to acquire jurisdiction, for the reason that it was impossible to know that two-thirds in amount of the insolvent's creditors has subscribed his petition. *Stanton v. Ellis*, *supra*; see *Forman v. Drew*, 4 Barn. & Cress. 15; *Reeves v. Lambert*, Id. 214; *Levy v. Dolbell*, 1 Moody & M. 202; *Booth v. Coldman*, 1 El. & El. 414; *Franklin v. Beesley*, 1 Id. 425.

The schedule should, also, set forth the true cause and consideration of the indebtedness in each case. The Act of 1817 (Laws of 1817, ch. 55, § 11), provided that a failure to give a true account of the consideration of the debt, should prevent a discharge, and should render fraudulent and void a discharge granted in such a case. Under that act it was held that a failure to state the consideration rendered the discharge absolutely void. *McNair v. Gilbert*, 3 Wend. 344. Such was the effect, also, of a defective statement of the consideration, as, for instance, that the debt was due on a note. *Slidell v. McCreia*, 1 Wend. 156; and see *Taylor v. Williams*, 20 Johns. 21.

The statute, as it now reads in the Revised Statutes, is materially changed. The requirement is simply that the schedule shall state the true cause and consideration of the indebtedness in each case. Emott, J., in *People v. Stryker*, 24 Barb. 649, 651. It is believed that, under this language, it would be necessary to show a fraudulent intent (under § 35, *supra*), in order

to invalidate a discharge on the ground of a defective or insufficient statement of the consideration of the indebtedness. This construction has been adopted under the subsequent article, where the same schedule is required (*post*, chap. VI). *Am. Flask & Cap Co. v. Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333, 337; see *Matter of Rosenburg*, 10 Abb. Pr. N. S. 450, 451.

And such has been the ruling under this statute. *People v. Stryker*, 24 Barb. 649; *Small v. Graves*, 7 Barb. 577; *Ayres v. Scribner*, 17 Wend. 407; *Soule v. Chase*, 1 Abb. Pr. N. S. 48, 60; but see remarks of Morgan, J., in *Merry v. Sweet*, 43 Barb. 476, 478.

The mere omission to insert the name of a creditor in the schedule, without any evidence of fraudulent intent, will not be sufficient to invalidate the discharge. *Am. Flask & Cap Co. v. Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333; *Clinton v. Hart*, 1 Johns. 375; *Lester v. Thompson*, 1 Id. 300; *Small v. Graves*, 7 Barb. 577; *Hall v. Robbins*, 61 Barb. 33; *Ayres v. Scribner*, 17 Wend. 407.

The same rule seems to apply to statements of assets. Thus, where the defendant omitted to state certain debts due to him, from the conviction that no part of them could be obtained, the persons indebted to him being insolvent, it was held that he should not be prejudiced by having omitted them, since the omission did not appear to the court to proceed from a fraudulent intent. *Brodie v. Stephens*, 2 Johns. 289. But when the omission was fraudulent, then the discharge was declared void. *Duncan v. Dubois*, 3 Johns. Cas. 125.

The reversionary interest which a person has in property which he has assigned for the payment of debts, or of which a receiver has been appointed, must be included in the schedule. *Billings Case*, 10 Abb. Pr. 258.

So, also, the remaining surplus and reversionary interest in property assigned to an assignee in bankruptcy. *Bullymore v. Cooper*, 46 N. Y. 236; see *Roswog v. Seymour*, 7 Robt. 427.

If the debtor does not know the name of the holder of a note or bill of exchange on which he is liable, he is then at liberty to give the best description he can of it. He may put in his schedule the name of the original drawer (or payee), and so be

discharged from the bill as to all other parties. If he knows the name of the holder of the bill, that is the name he is to insert. *Boydell v. Champneys*, 2 M. & W. 432; see *Beck v. Beverly*, 11 M. & W. 844; *Romellio v. Halaghan*, 1 Best & S. 279, under 7 Geo. 4, ch. 57.

Where an agreement was entered into between an insolvent and one of his creditors, that the creditor's debt should be omitted from the schedule, and should be paid immediately after the discharge, this was held to be a fraud upon the other creditors and upon the court. *Fabram v. Freeman*, 2 Cr. & M. 451; see *Howard v. Bartolozzi*, 4 B. & Ad. 555.

The insertion of the name of a creditor in the schedule with a memoranda that his claim is barred by the statute of limitations, is not an admission that he is still a creditor. *Avery's Case*, 6 Abb. Pr. 144.

Defects in the schedules may be remedied by amendment on the return day of the order to show cause. *Matter of Hurst*, 7 Wend. 239; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450; *Brodie v. Stephens*, 2 Johns. 289.

§ 25. *Penalty for false swearing*.—"Every creditor who shall swear, in any proceeding under this title, that any sum of money is due to him from any debtor which is not really due, or that more is due than the sum really due, knowing the same not to be due, shall forfeit double the sum so falsely sworn to be due, to the assignees or trustees of the estate of such debtor, to be recovered by them." 2 R. S. 37, § 12; 3 R. S. 6th ed. 30, § 12; 2 Edm. 38; 1 Fay's Dig. 383.

§ 26. *Officers to whom applications are to be made*.—"Every such petition may be presented to any officer specified in the first section of the seventh article of this title, or to any judge of any county court." 2 R. S. 17, § 6; 3 R. S. 6th ed. 14, § 9; 2 Edm. 18; 1 Fay's Dig. 369.

The section referred to provides that applications for the discharge of an insolvent from his debts may be made to either of the following officers: justices of the Supreme Court, county judges, recorders of cities; and if made in the city of Schenectady, to the mayor thereof; and applications may be made to

any county judge, as in the said articles specified; but no application under any article of this title shall be made to any alderman of the city of New York. 2 R. S. 34, § 1; 3 R. S. 6th ed. 28, § 1; 2 Edm. 35; 1 Fay's Dig. 382.

Under these sections the application may be made anywhere throughout the State to a judge of the Supreme Court, or to a county judge. In the city of New York the application may also be made to one of the justices of the Superior Court (Laws of 1847, ch. 255, 281, § 7; *Renard v. Hargous*, 13 N. Y. 259; Laws of 1873, ch. 239, § 1); or of the Court of Common Pleas (Laws of 1847, ch. 255, § 7; Code of Civ. Pro. § 286); or to the city judge (*Averys Case*, 6 Abb. Pr. 144) or recorder. In the city of Buffalo applications may also be made to the judges of the Superior Court of that city. Laws of 1857, ch. 361, § 25; see Code of Civ. Pro. § 293. In the city of Brooklyn, to the judges of the City Court of that city (Laws of 1873, ch. 239, § 1); and in the city of Schenectady to the mayor (*supra*).

§ 27. *Residence of officer*.—"Applications under the third, fourth¹ and fifth² articles of this title shall be made to an officer residing in the county in which the insolvent or imprisoned debtor resides, or is imprisoned; and proof of such residence or imprisonment shall be made at the time of presenting the petition, and before any order shall be granted thereon." 2 R. S. 35, § 2; 3 R. S. 6th ed. 28, § 2; 2 Edm. 36; 1 Fay's Dig. 382.

"If there be no justice of the Supreme Court, recorder or judge of a county court, residing within any county, and disinterested as creditor or otherwise, to whom application can be made under the third, fourth³ and fifth⁴ articles of this title, then application under the said article may be made to any such officer residing in any other county; but no place shall be appointed for the hearing on any application out of the county in which the insolvent resides or is imprisoned." 2 R. S. 35, § 4; 3 R. S. 6th ed. 29, § 4; 2 Edm. 36; 1 Fay's Dig. 382.

§ 28. *Collusive discharge void*.—"When the insolvent shall,

¹ *Post*, Chapter V.

² *Post*, Chapter V.

³ *Post*, Chapter VI.

⁴ *Post*, Chapter VI.

by collusion with any prosecuting creditor, procure himself to be imprisoned in a county different from that of his residence, for the purpose of obtaining a discharge in such county, under the third or fifth¹ articles of this title, a discharge granted in such county where the insolvent is so imprisoned by collusion, shall be void ; and if such collusion shall be proved on the hearing, it shall defeat the application.” 2 R. S. 35, § 3 ; 3 R. S. 6th ed. 29, § 3 ; 2 Edm. 36 ; 1 Fay’s Dig. 382.

§ 29. *Where officer is incapable of acting.*—“In case of the death, sickness, resignation, removal from office, absence from the county of his residence, or other disability, of any officer before whom any proceedings may have been commenced under the first,² second,³ third, fourth⁴ or fifth⁵ articles of this title, the said proceedings may be continued by his successor in office, or by any other officer residing in the same county, who might have originally instituted such proceedings, in the same manner and with like effect as if originally commenced before him.” 2 R. S. 35, § 5 ; 3 R. S. 6th ed. 29, § 5 ; 2 Edm. 36 ; 1 Fay’s Dig. 382.

In the Matter of Jacobs (12 Abb. Pr. N. S. 273), where the order was made returnable before F. L., one of the judges of the Court of Common Pleas for the city and county of New York, and that judge was absent from the county on the return day, a judge of that court before whom the proceeding was brought, took judicial cognizance of the absence of his associate, and proceeded with the hearing. See Code of Civ. Pro. § 26.

“If there be no officer in the same county competent under the last section to continue such proceedings, then any judge of the county courts may attend at the time and place appointed for the hearing of any matter, and may adjourn the same to the next county court, to be held in and for the county in which such hearing was appointed ; and the said court shall proceed therein in the same manner and with the like authority as the officer who commenced such proceedings.” 2 R. S. 35, § 6 ;

¹ *Post*, Chapter VI.

² This article has been repealed.

³ 2 R. S. Part 2, chap. 5, Title 1, art. 2.

⁴ *Post*, Chapter V.

⁵ *Post*, Chapter VI.

as amended Laws of 1847, ch. 280, § 29 ; 3 R. S. 6th ed. 29, § 6 ; 2 Edm. 36 ; 1 Fay's Dig. 382.

§ 30. *Facts that must be shown to confer jurisdiction.*—The application being about to be made to the proper officer, it is convenient at this point to enumerate the matters which are requisite to give the officer jurisdiction to entertain the proceeding.

In *Soule v. Chase* (1 Abb. Pr. N. S. 48, 57), approved as to the regularity of the discharge (39 N. Y. 342, 343), but reversed on other grounds, Mr. Justice Robertson, adopting the language of Mr. Justice Ingraham in *Rusher v. Sherman* (28 Barb. 416), states the following as necessary jurisdictional facts :

- 1st. A proper petition by proper parties.
- 2nd. Proper affidavits by the petitioning creditors of the nature, amount and consideration of their debts, and their freedom from any bribe.
- 3rd. A proper account of creditors and the amounts due them ; the consideration of their debts, and any security held by them therefor.
- 4th. A proper inventory.
- 5th. The oath of the insolvent before the officer as to the accuracy of his petition and schedule, and other matters required by the statute.
- 6th. Proof of residence.

"These," says Ingraham, J., in *Rusher v. Sherman* (*supra*), "are all the requisites to give the officer jurisdiction," that is, jurisdiction to entertain the proceeding, but other steps prescribed by the statute must also be strictly followed before the officer will have authority to grant the discharge.

The matters mentioned above have been considered in their regular order, with the exception of the affidavit of the insolvent, and proof of residence, both of which are to be made at the time when the application is presented.

§ 31. *Insolvent's affidavit.*—"An affidavit in the following form shall be annexed to the said petition, account and inventory, and shall be sworn to and subscribed by such

insolvent, in the presence of such officer, who shall certify the same.

"I, _____, do swear (or affirm, as the case may be), that the account of my creditors and the inventory of my estate, which are annexed to my petition, and herewith delivered, are in all respects just and true; and that I have not, at any time or in any manner whatsoever, disposed of, or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors with a view fraudulently to obtain the prayer of my petition." 2 R. S. 17, § 7; 3 R. S. 6th ed. 15, § 10; 2 Edm. 18; 1 Fay's Dig. 369.

A compliance with the requirements of this section is requisite in order to give the officer jurisdiction. Where the affidavit was not sworn to before the judge, nor subscribed by him before granting the order for the creditors to appear and show cause, this was held to be a fatal defect which could not be cured by a subsequent verification. *Ely v. Cooke*, 28 N. Y. 365; s. c. 2 Abb. Dec. 14; affi'g in part 6 Abb. Pr. 366; s. c. 2 Hill, 406; *Small v. Wheaton*, 4 E. D. Smith, 427; 2 Abb. Pr. 316.

So, under the fourteen day act (*post*, chap. VII), a similar requirement has been held to be mandatory. *Bullymore v. Cooper*, 46 N. Y. 236; *Browne v. Bradley*, 5 Abb. Pr. 141.

The language of the affidavit should comply strictly with the statute. Thus, where the affidavit was in these words, "I have not at any time or in any manner whatever disposed of or made over any part of my estate for the future benefit of myself *and* family," instead of using the words of the statute, "for the benefit of myself *or* family," this affidavit was held fatally defective, and the discharge granted in the proceedings was adjudged void. *Hale v. Sweet*, 40 N. Y. 97; affi'g *Merry v. Sweet*, 43 Barb. 475.

§ 32. *Proof of residence*.—The section cited above [§ 27], requires that the application shall be made to an officer residing

in the county in which the insolvent debtor resides, or is imprisoned, and proof of such residence, or imprisonment, must be made at the time of presenting the petition, and before any order shall be granted thereon.

The words of the statute make this preliminary proof of residence within the county a jurisdictional fact. *People ex rel, Pacific Ins. Co. v. Machado*, 16 Abb. Pr. 460 (Gen. Term. Supm. Ct. N. Y. Co.); *Matter of Wrigley*, 8 Wend. 134; s. c. 4 Id. 602; *Rusher v. Sherman*, 28 Barb. 416; *Jenks v. Stebbins*, 11 Johns. 224; *Otis v. Hitchcock*, 6 Wend. 433. In the first case cited, when the petition of the insolvent recited that he was of the city, county and State of New York, and annexed to the petition was an affidavit of a person who swore that he knew the insolvent, and that he was a resident and inhabitant of the State of New York, it was held that a discharge granted on these papers was inoperative for the reason that it did not appear that the insolvent was a resident of, or was imprisoned within the county in which the officer resided to whom the petition was presented. But it seems that if there were a positive averment of the fact of residence in the petition, no other proof would be necessary. *Russell & Erwin Mfg. Co. v. Armstrong*, 12 Abb. Pr. 472; aff'd 10 Id. 258, note. Compare *Morewood v. Hollister*, 6 N. Y. 309, 316.

The proper course is to have the petitioner or some person acquainted with the fact, appear before the judge at the time the petition is presented, and make oath to the fact that the insolvent is a resident and inhabitant of the county in which the officer to whom the application is made, resides.

As to what constitutes residence and inhabitancy within the purview of the statute. See *Matter of Wrigley*, 8 Wend. 134; s. c. 4 Id. 602; *Roosevelt v. Kellogg*, 20 Johns. 208, 210.

CHAPTER III.

THE ORDER TO SHOW CAUSE, NOTICE AND HEARING.

§ 33. *The order to show cause.*—The petition, schedules and affidavits having been presented to the proper officer, he having sworn the petitioner to the affidavit, and having taken proof of his residence, is then authorized to make an order pursuant to the following sections. “The officer receiving such petition, schedule and affidavit, shall make an order requiring all the creditors of such insolvent to show cause, if any they have, at a certain time and place to be specified by him, why an assignment of the insolvent’s estate should not be made and he be discharged from his debts.” 2 R. S. 18, § 8; 3 R. S. 6th ed. 15, § 11; 2 Edm. 18; 1 Fay’s Dig. 369.

§ 34. *Time and place of showing cause.*—“If the officer making such order be a judge of a county court, and not of the degree of counsellor at law, the order shall require such cause to be shown at the term of such court to be held next after the expiration of the time of publication of the notice thereof, as hereinafter directed; and the order shall specify the time and place at which such term will be held. In every other case the order shall require such cause to be shown before the officer to whom the petition shall be presented.” 2 R. S. 18, § 9; 3 R. S. 6th ed. 15, § 12; 2 Edm. 19; 1 Fay’s Dig. 369.

The statute prescribes no length of time for which notice shall be given, except such as must necessarily elapse before the expiration of the time of publication of the notice. The order must therefore be made returnable at a time sufficiently remote to permit the publication of notice for six or ten weeks as the residence of creditors may require. (See § 36, *post.*)

The order must be made returnable before the officer to whom the petition is presented, except in the case provided for in the above section, and no place can be appointed for the hearing on any application out of the county in which the in-

solvent resides or is imprisoned. 2 R. S. 35, § 4. See § 27, *ante*.

§ 35. *Notice of order*.—"The officer granting such order shall direct notice of its contents to be published in the State paper and in a newspaper printed in the county in which such application is made, if there be one, and if there be none, in a newspaper printed nearest to such county; and if one-fourth part in amount of the debts owing by such insolvent shall have accrued in the city of New York, or be due to creditors residing there, such officer shall also designate a newspaper in that city in which such notice shall be published." 2 R. S. 18, § 10; 3 R. S. 6th ed. 15, § 13; 2 Edm. 19; 1 Fay's Dig. 370.

§ 36. *Time of publication*.—"If all the creditors of such insolvent reside at a less distance than one hundred miles from the place at which they are required by such order to show cause, the said officer shall direct such notice to be published once in each week, for six successive weeks; and if any of such creditors reside more than one hundred miles from such place, the notice shall be directed to be published once in each week for ten weeks successively." 2 R. S. 18, § 11; 3 R. S. 6th ed. 15, § 14; 2 Edm. 19; 1 Fay's Dig. 370.

The time between the first publication and the day appointed to show cause should be at least the full number of weeks named in the order. Thus where the publication was ordered to be made for ten successive weeks, but there were in fact but sixty-eight days between the first publication and the hearing, the notice was deemed insufficient. *People ex rel. Demarest v. Gray*, 10 Abb. Pr. 468; s. c. 19 How. Pr. 238; *Anon.* 1 Wend. 90. In *Soule v. Chase* (1 Robt. 222; s. c. 1 Abb. Pr. N. S. 48 [rev'd in Court of Appeals on another ground, 39 N. Y. 342]), it was held that if there be ten publications, it is not necessary that there be ten full weeks before the hearing. See *Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372, 377; *Olcott v. Robinson*, 21 N. Y. 150; *Wood v. Morehouse*, 45 N. Y. 368. But the publication must be made once in every week. It is not enough that there be ten publications in all. The officer has no jurisdiction, if there be any, of the ten weeks in which

there was no publication. *Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372. The period of publication must be computed so as to exclude the first day of publication and include the last. Code of Civ. Pro. § 787; see *Brod v. Heyman*, 3 Abb. Pr. N. S. 396; *Steinle v. Bell*, 12 Abb. Pr. N. S. 171; *Bunce v. Reed*, 16 Barb. 347.

The notice must be published as ordered. Thus where notice was directed to be given for the 6th of June, 1874, and the notice published was of an application to be made on the 3d of June, 1874, it was held that, until the publication of the notice was made as directed, and proof of such publication was before the officer, he was without jurisdiction. *People ex rel. Lewis v. Daly*, 11 N. Y. Supm. (4 Hun), 641.

§ 37. *Notice jurisdictional*.—The notice required by the statute is essential to the jurisdiction of the officer; of course not necessary to give him jurisdiction to make the order to show cause, but to give him jurisdiction to proceed to a discharge. *Matter of Underwood*, 3 Cow. 59; *Lewis v. Page*, 8 Abb. Pr. N. S. 200; *Small v. Wheaton*, 4 E. D. Smith, 427; *Stanton v. Ellis*, 16 Barb. 319; *Van Slyke v. Sheldon*, 9 Barb. 278; *People ex rel. Lewis v. Daly*, 11 N. Y. Supm. Ct. (4 Hun), 641. But whether the sufficiency of the proof presented to and passed upon by the officer can be inquired into in a collateral proceeding, was doubted in *Soule v. Chase*, 1 Abb. Pr. N. S. 48, 58; s. c. 1 Robt. 222; 39 N. Y. 342; and see opinion of Denio, J., in *Stanton v. Ellis*, 12 N. Y. 575, 580.

The names of the creditors are not required to be inserted in the notice; all that is necessary is to direct the notice "To the creditors of ———, an insolvent debtor." *Am. Flask & Cap Co. v. Son*, 7 Robt. 233, 238; s. c. 3 Abb. Pr. N. S. 333; see *O'Connell v. Sutherland*, 16 Abb. Pr. 460, note.

§ 38. *Notice to be served personally or by mail*.—"Whenever an order shall be made by any judge or officer under the provisions of the third article, of the fifth chapter, of the first title, of the second part of the Revised Statutes, requiring cause to be shown why an assignment of an insolvent's estate shall not be made, and he be discharged from his debts, it shall be the duty of the said judge or officer, in addition to the publication of the said notice, as provided in the tenth section of the said

article, to direct, in all cases where any of the creditors of the said insolvent reside in the United States, and where the place of such residence is known to the said insolvent, the service of notice of such order on each of said creditors in person, or by letter addressed to him by mail at his known and usual place of residence, and if such service shall be personal, it shall be at least twenty days, and if by mail, then forty days before the day fixed for showing cause against such discharge." Laws of 1847, ch. 366, § 1; 3 R. S. 6th ed. 15, § 15; 4 Edm. 481; 1 Fay's Dig. 373.

Service by mail by depositing the notice in the post office in the same town where the creditor resides, is sufficient. *O'Connell v. Sutherland*, 16 Abb. Pr. 460, note.

§ 39. *Mode of publication; Fees.*—"Such notice may be published in the following manner: First, a general heading, stating whether such notices are for the purpose of being discharged from debt, or for the purpose of having the person exonerated from imprisonment, shall be prefixed to each class of applicants; next, the name of the applicant; next, the date of the first publication of such notice; next, the name of the officer before whom creditors are required to appear; next, the place appointed for such appearance; next, the time for such appearance; and every such publication shall be deemed as valid as if such notice had been published at length." 2 R. S. 648, § 44; 3 R. S. 6th ed. 920, § 55; 2 Fay's Dig. 46.

The fees to be paid for publishing the notice are likewise provided by law, as follows:

"For publishing notice of any application by an insolvent under the provisions of the fifth chapter, of the second part of the Revised Statutes, and furnishing the evidence of such publication for six weeks, one dollar and sixty-seven cents; if published ten weeks, two dollars." 2 R. S. 648, § 43; 3 R. S. 6th ed. 920, § 54; 2 Fay's Dig. 46.

§ 40. *The hearing and proceedings thereon.*—"On the day or at the term appointed in such order, or on any subsequent day or term that the officer or court before whom cause is required to be shown may appoint, the said officer or court, as the case may be, shall proceed to hear the proofs and allegations of the parties; and before any other proceedings be had, he shall

require proof of the publication of the notice as herein directed." 2 R. S. 18, § 12; 3 R. S. 6th ed. 16, § 17; 2 Edm. 19; 1 Fay's Dig. 370.

"The said judge shall not proceed to hear the proof and allegations of the parties in the matter, nor shall any proceedings be had on the day appointed to show cause, until proof shall have been given to the satisfaction of said judge or officer of the service of the said notice, in the manner required by this act. Provided, however, that nothing herein contained shall be deemed to apply to any proceedings commenced before this act shall take effect." Laws of 1847, ch. 366, § 2; 3 R. S. 6th ed. 16, § 16; 4 Edm. 481; 1 Fay's Dig. 374.

When the time for the hearing has arrived, the officer may at once proceed to hear the proofs and allegations of the parties. He is not bound in strictness to wait beyond the arrival of the precise time appointed, though in the exercise of his discretion he may wait longer. Where a creditor who wished to oppose the discharge appeared after the hour of the return, and the officer refused to hear him, it was held to be matter of discretion which could not be reviewed on *certiorari*. *Ex parte Hagaman*, 2 Hill, 415; *Matter of Pulver*, 6 Wend. 632. But if, through any artifice, parties have been misled as to the time appointed, or have been prevented from appearing at such time, the judge has power to vacate an order of assignment and let in the parties to oppose the discharge. *Matter of Bradstreet*, 13 Johns. 385.

§ 41. *Preliminary proofs*.—The first step, and one required to be taken before the judge proceeds to hear the proofs and allegations of the parties, is to produce proof to the satisfaction of the judge or officer of the service of the notice, either personally or by mail, as required by the sections cited; and before any proceeding other than the hearing of the proofs and allegation are had, the officer is directed to require proof of the publication of the notice.

Some proof of the service and publication of the notice, upon which the officer can pass as to its sufficiency, is indispensable, and without it he acquires no jurisdiction to proceed further. See cases cited, § 37, *ante*; *Lewis v. Page*, 10 Abb.

Pr. N. S. 200, Brady, J. 204; *Stanton v. Ellis*, 16 Barb. 319, 322; but see s. c. 12 N. Y. 575, 580. But whether, after proofs of service and publication have been submitted to the officer, and he has found that the statute has been complied with, the sufficiency of such proof can be questioned in a collateral proceeding, has been doubted. *Soule v. Chase*, 1 Abb. Pr. N. S. 48, 58; *Stanton v. Ellis*, 12 N. Y. 575, 580; *O'Connell v. Sutherland*, 16 Abb. Pr. 460, note. Though it can undoubtedly be raised on *certiorari*. *People ex rel. Demarest v. Gray*, 10 Abb. Pr. 468; s. c. 19 How. Pr. 238; *Anon.* 1 Wend. 90. The omission in an affidavit of service of the notice to creditors to insert the deponent's name in the commencement or caption is not a defect for which the discharge can be avoided collaterally. *O'Connell v. Sutherland*, 16 Abb. Pr. 460, note.

§ 42. *Opposing creditors*.—If the creditors neglect to appear and raise objections, they are concluded, if the officer had the requisite jurisdiction, except as to the matters which the statute declares shall avoid the assignment. *People v. Stryker*, 24 Barb. 649; *Soule v. Chase*, 39 N. Y. 342, 345, Hunt, Ch. J., dissenting on other grounds; *Matter of Bradstreet*, 13 Johns. 385. Appearing and participating in proceedings over which a court or officer has no jurisdiction, does not prevent a party from assailing them for want of it. *Grocers' Nat. Bank v. Clark*, 31 How. Pr. 115; *Garcie v. Sheldon*, 3 Barb. 232. But where a judgment creditor appeared by attorney upon the proceedings for a discharge of the debtor, and relinquished all opposition and consented to a discharge, but subsequently issued an execution on the judgment, it was held that the conduct of the attorney was equivalent to an abandonment of the suit, and that a perpetual stay of execution on the judgment ought to be granted. *Lee v. Curtiss*, 17 Johns. 85.

It seems that every creditor, distinctly recognized as such in the schedule, may appear and oppose the discharge. All others when they come in to oppose the discharge, must first prove their claims as subsisting claims, otherwise they are not authorized to appear and oppose. *Avery's Case*, 6 Abb. Pr. 144. A person named in the schedule as a creditor, with a memoranda that his claim is barred by the statute of limitations, cannot

without further proof of his claim oppose the discharge. *Avery's Case, supra.*

§ 43. *Grounds of opposition.*—The opposing creditor may, of course, object to the granting of the order upon any of the grounds which would avoid the discharge, if granted (see § 76, *infra*); but they may also controvert the facts which the officer or court is required to find before granting the order (§ 54, *infra*). They may oppose upon the ground that the insolvent is not justly and truly indebted to the petitioning creditors in the sums by them respectively mentioned in their affidavits. *Cohen's Case*, 10 Abb. Pr. 257. That such sums do not amount in the aggregate to two-thirds of all the debts that were owing by such insolvent, at the time of presenting his petition, to creditors residing in the United States; that such insolvent has not honestly and fairly given a true account of his estate, and has not in all things conformed to the matters required of him by the statute. Under the objection that the debtor has not given a true account of his estate, a creditor will have an opportunity to examine into all dispositions of the debtor's property. *Cohen's Case*, 10 Abb. Pr. 257.

In the Matter of Hurst (7 Wend. 240), where a debtor had confessed a judgment, which amounted to a general assignment for the benefit of all his creditors *pro rata*, it was held that this was such a fraud upon the insolvent laws as ought to defeat his discharge. The judgment in that case was confessed on the very day the petition was presented, and under suspicious circumstances. The same month that that case was decided, Chan. Walworth, in Corning v. White (2 Paige, 567), expressed the opinion that a creditor might assign his property without giving preferences, without depriving himself of the privilege of applying for a discharge. Such is also the opinion expressed by Jones, J., in *Roswog v. Seymour* (7 Robt. 427, 430).

§ 44. *Adjournments ; Witnesses.*—"On the hearing of any petition under the third, fourth,¹ fifth² or sixth³ articles of this title, the officer or court before whom the same may be pending, may adjourn the same from time to time, and may issue a subpoena requiring the wife of a debtor or any other person,

¹ Chap. V, *post.*

² Chap. VI, *post.*

³ Chap. VII, *post.*

whether an opposing creditor or not, to appear and testify concerning the subject-matter; and the debtor and any creditor may, in all cases, be examined at the instance of any creditor in any proceedings under these articles." 2 R. S. 37, § 13; 3 R. S. 6th ed. 30, § 13; 2 Edm. 38; 1 Fay's Dig. 383.

"The appearance of every person duly subpœnaed and neglecting or refusing to appear, may be enforced by attachments to be issued by such officer or court; and if, after appearance, any such person shall refuse to testify, he shall be committed to prison until he submit." 2 R. S. 37, § 14; 3 R. S. 6th ed. 30, § 14; 2 Edm. 38; 1 Fay's Dig. 383.

"Every person disobeying such subpœna wilfully, shall forfeit one hundred and twenty-five dollars, to be recovered by and in the name of the party at whose instance he was subpœnaed." 2 R. S. 37, § 15; 3 R. S. 6th ed. 30, § 15; 2 Edm. 38; 1 Fay's Dig. 384.

"Whenever any hearing shall be had before any officer singly, or before him and a jury, or before a court, under any of the provisions of this title, it shall be the duty of such officer, or of the presiding judge of the court, to keep minutes of the material part of the testimony delivered before him, and of the examinations of any debtor." 2 R. S. 37, § 16; 3 R. S. 6th ed. 30, § 16; 2 Edm. 38; 1 Fay's Dig. 384.

§ 45. *Demand of jury and proceedings thereon.*—
"Every creditor opposing the discharge of an insolvent under this article, may, at the time appointed for the first hearing, demand of the officer or court before whom such hearing shall be had, that the case of such insolvent be heard and determined by a jury; and shall be entitled to an order to that effect upon filing with such officer or court, a specification in writing, of the grounds of his objection to such discharge." 2 R. S. 18, § 13; 3 R. S. 6th ed. 16, § 18; 2 Edm. 19; 1 Fay's Dig. 370.

"Upon such demand being made to any court before which a hearing shall be had, a jury shall be drawn in the same manner as for the trial of civil causes from the jurors summoned and attending such court, who shall be sworn, as prescribed in the succeeding sixteenth section." 2 R. S. 19, § 14; 3 R. S. 6th ed. 16, § 19; 2 Edm. 19; 1 Fay's Dig. 370.

“If such demand be made to any single officer, he shall nominate eighteen reputable freeholders of the county, and shall issue a summons to the sheriff or any constable of the county, commanding him to cause the persons so nominated, to appear before such officer, at a time and place to be specified in the summons, not less than six nor more than twelve days from the time of issuing the same.” 2 R. S. 19, § 15; 3 R. S. 6th ed. 16, § 20; 2 Edm. 20; 1 Fay’s Dig. 370.

“At the time and place so appointed, twelve of the persons so summoned and appearing, shall be balloted for and drawn, in like manner as jurors in a court of record; and shall be sworn by such officer, well and truly to hear, try and determine the validity of the objections so specified.” 2 R. S. 19, § 16; 3 R. S. 6th ed. 16, § 21; 2 Edm. 20; 1 Fay’s Dig. 370.

“Such jury so drawn and sworn, either by a court or any officer, having heard the proofs and allegations of the parties, shall determine the matters submitted to them; and, for that purpose, shall be kept together by some proper officer, to be sworn as is usual in like cases in court of record, until they agree upon their verdict, and such verdict shall be conclusive in the premises.” 2 R. S. 19, § 17; 3 R. S. 6th ed. 16, § 22; 2 Edm. 20; 1 Fay’s Dig. 370.

“The verdict so rendered shall be recorded by the court or officer, in the minutes of the proceedings.” 2 R. S. 19, § 18; 3 R. S. 6th ed. 16, § 23; 2 Edm. 20; 1 Fay’s Dig. 370.

“There shall be but one hearing before a jury in any case under this article. If such jury cannot agree, after being kept together for such time as the officer or court shall think reasonable, then they shall be discharged, and the court or officer shall decide upon the merits of the application, as if no jury had been called.” 2 R. S. 19, § 19; 3 R. S. 6th ed. 16, § 24; 2 Edm. 20; 1 Fay’s Dig. 370.

“Every person who shall be summoned as a juror under the provisions of title first, chapter fifth, of part second, of the Revised Statutes, and shall refuse or neglect to attend, without reasonable cause to be determined by the officer issuing such summons, shall forfeit ten dollars, to be recovered by any creditor at whose instance such summons was issued; and in case of his neglect to prosecute for the same, then it

shall be competent for the insolvent to sue for and recover the said penalty." Laws of 1830, ch. 258, § 3; 3 R. S. 6th ed. 30, § 17; 2 Edm. 38; 1 Fay's Dig. 384.

"The sheriff or constable summoning a jury under the provisions of this title, shall be entitled to receive one dollar and twelve and a half cents; and each juror attending and sworn, twenty-five cents. The said fees, together with all other expenses of the hearing of any case by a jury, shall be paid by the creditors requiring the same." 2 R. S. 37, § 18; 3 R. S. 30, § 18; 2 Edm. 39; 1 Fay's Dig. 384.

§ 46. *Examination of non-resident wife of debtor.*—"Upon the application of any creditor of such insolvent, the officer who made the order for publication of notice, may, at any time not less than three weeks previous to the day or term fixed for the hearing of such petition, by written order require the insolvent to bring before such officer or before the court, at the time appointed for the hearing, the wife of such insolvent, if she do not reside within this State, to the end that she may be examined as a witness." 2 R. S. 19, § 20; 3 R. S. 6th ed. 16, § 25; 2 Edm. 20; 1 Fay's Dig. 370.

"If such non-resident wife do not attend at the time and place specified in such order, the insolvent shall not be entitled to his discharge, unless he shall prove to the satisfaction of such court or officer that he was unable to procure the attendance of his wife, for the purpose of being examined." 2 R. S. 19, § 21; 3 R. S. 6th ed. 17, § 26; 2 Edm. 20; 1 Fay's Dig. 371.

§ 47. *Examination of insolvent.*—"At the hearing of any such petition before a jury or otherwise, the insolvent may be examined on oath at the instance of any creditor touching his estate or debts, or any matter stated in his schedule, and may be required to state any changes that have occurred in the situation of his property since the making of such schedule, and particularly whether he has collected any debts or demands, or made any transfers of any part of his real or personal estate. But this section shall not be construed to prevent any such creditor from contradicting or impeaching, by other competent testimony, any evidence given by such insolvent." 2 R. S. 20, § 22; 3 R. S. 17, § 27; 2 Edm. 20; 1 Fay's Dig. 371.

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§ 48. *Payments or transfers made after filing petition.*—“If it shall appear on such examination or otherwise, by competent proof, that such insolvent has collected any debts or demands, or made any transfer, absolute, conditional or otherwise, of any part of his real or personal estate, since the making of the schedule annexed to his petition, he shall be required to pay forthwith to the officer or to the clerk of the court before whom the hearing shall be had, the full amount of all debts and demands so by him collected or received, and the full value of all property so by him transferred, except such parts of the said debts and property as shall satisfactorily appear to the officer or court to have been necessarily expended by such insolvent for the support of himself or his family; and no discharge shall be granted to him under the provisions of this article until such payment be made or security satisfactory to the officer or court be given, that such payment shall be made within thirty days thereafter, to the assignees of such insolvent.” 2 R. S. 20, § 23; 3 R. S. 17, § 28; 2 Edm. 21; 1 Fay's Dig. 371.

The creditors acquire no lien upon the property by the fact that the debtor has presented his petition. The property is still under the control of the insolvent. He may sell it, and though it may be improper for him to do so, the purchaser acquires a valid title. The title to the inventoried property cannot be effected until it is assigned according to the statute. *Bailey v. Burton*, 8 Wend, 339; see *Nielly v. Richardson*, 4 Cow. 607.

This seems to have been the occasion for enacting this section. The revisors say: “It is supposed that the assignment passes only the property which the insolvent had at the time of its execution and delivery, as no retroactive effect seems to have been given by the act. The consequence would appear to be that he would not be required to account for property sold or debts collected since the presentation of his petition. The above section has been drawn to prevent such conduct, and to remove any doubt that might exist, whilst a suitable provision has been made for the support of the debtor and his family.”

§ 49. *Preferences debar the debtor from discharge.*—“If it shall appear on such hearing, by the examination of the insolvent or otherwise, that said insolvent has at any time within

two years before presenting his petition for his discharge, under the provisions of this article, in contemplation of his becoming insolvent, or of his petitioning for such discharge, or knowing of his insolvency, made any assignment, sale or transfer, either absolute or conditional, of any part of his estate, real or personal, or of any interest therein, or has confessed any judgment or given any security with a view to give a preference for an antecedent debt to any creditor, he shall not be entitled to a discharge under this article." 2 R. S. 20, § 24, as amended by Laws of 1854, ch. 147; 3 R. S. 6th ed. 17, § 29; 2 Edm. 21; 1 Fay's Dig. 371.

The object of this section was to prevent the execution of preferential assignments by depriving such assignors of the benefit of the insolvent laws. "Preferences," say the revisors in their note to this section, "may still be made either with the assent of creditors or at the hazard of losing the benefit of the insolvent laws. The doctrine evidently deducible from the statute, is that a debtor who creates a trust of all his property on behalf of creditors giving preferences, can never claim a discharge from any debt existing when the trust was constituted. It is a legal bar created by this statute to the relief claimed by the insolvent."

Where the insolvent, within two years before presenting his petition, executed a general assignment giving preferences, it was held that the execution of the assignment was itself evidence of the insolvency of the assignor, and the statute operated as a bar to his discharge. *Morewood v. Hollister*, 6 N. Y. 309.

An objection to a discharge upon this ground, must be taken at the hearing. A preference does not *per se* render the discharge void. *Hayden v. Palmer*, 24 Wend. 364.

A debtor cannot set up as a defense to a note which he has transferred with the intent to give a preference, that the transfer was illegal. *Hatch v. Brewster*, 53 Barb. 276.

The bankrupt law of 1867 (U. S. R. S. § 5110), provided that no discharge should be granted, or if granted, should be valid in case the bankrupt had given any fraudulent preference contrary to the provisions of the act.

That section referred to such preferences as were made by

one who was insolvent or in contemplation of insolvency or bankruptcy, and with the intent and purpose that the creditor receiving it should have an advantage over the others. *In re Bent*, 8 N. B. R. 444; *In re Jones*, 13 Id. 286; *Matter of Poisen*, 10 Id. 107; *In re Batchelder*, 3 Id. 150.

It did not, and such seems to be a reasonable construction of this section of our statute, refuse a discharge to an insolvent who, in ignorance of his condition, makes a payment in good faith although in fact insolvent. *In re Bent, supra*; *In re Jones, supra*; *Matter of Poisen, supra*; see Blumensteil's Bankruptcy, p. 515.

CHAPTER IV.

ASSIGNMENT, DISCHARGE, AND SUBSEQUENT PROCEEDINGS.

§ 50. *Assignment of debtor's property.*—"If it shall satisfactorily appear to the officer or court before whom such application is pending, in cases where no jury has been required, or the jury have disagreed, that the insolvent is justly and truly indebted to the petitioning creditors in the sums by them respectively mentioned in their affidavits; that such sums amount in the aggregate to two-thirds of all the debts that were owing by such insolvent at the time of presenting his petition, to creditors residing within the United States; that such insolvent has honestly and fairly given a true account of his estate, and has in all things conformed to the matters required of him by this article; the officer or court before whom the application shall be pending, shall direct an assignment of all such insolvent's estate, both in law and equity, in possession, reversion, or remainder, excepting from the articles mentioned in his inventory, such articles of wearing apparel and bedding, as, in the opinion of such officer or court, shall be reasonable and necessary for such insolvent and his family to retain, and also the arms and accoutrements required by law to be provided by any citizen enrolled in the militia." 2 R. S. 20, § 25; 3 R. S. 6th ed. 17, § 30; 2 Edm. 21; 1 Fay's Dig. 371.

When an order of assignment has been made, the officer granting the order cannot afterwards vacate it, unless there has been surprise on the opposing creditors, or they have been misled by the opposite party. *Matter of Bradstreet*, 13 Johns. 385.

§ 51. *Finding of jury conclusive.*—"When any of the matters in the last section, required to be established previous to granting an order of assignment, shall have been submitted to a jury as herein provided, and shall have been found in favor of the insolvent, such finding shall be conclusive, as to such matters, upon the officer or court before whom the proceedings

are pending, and the officer or court shall direct an assignment accordingly." 2 R. S. 21, § 26; 3 R. S. 6th ed. 18, § 31; 2 Edm. 22; 1 Fay's Dig. 371.

§ 52. *Assignment, to whom made.*—"Such assignment shall be made to the person or persons who shall have been nominated as assignee or assignees, by the petitioning creditors, or by such a number of the said petitioners as shall have owing to them a major part of the debts, constituting the two-thirds as herein required." 2 R. S. 21, § 27; 3 R. S. 6th ed. 18, § 32; 2 Edm. 22; 1 Fay's Dig. 372.

No method is provided by the statute for the choice of an assignee by the creditors. The usual practice is to name in the petition, the assignee to whom the creditors desire that the assignment should be made.

§ 53. *Effect of assignment.*—"Such assignment shall vest in the assignees all the interest of such insolvent at the time of executing the same, in any estate or property, real or personal, whether such interest be legal or equitable; but no contingent interest shall pass to the assignees by virtue of such assignment, unless the same shall become vested within three years after the making of the assignment; and in case of its becoming so vested, it shall pass to the assignees in the same manner as it would have vested in such insolvent if no assignment had been made by him." 2 R. S. 21, § 28; 3 R. S. 6th ed. 18, § 33; 2 Edm. 22; 1 Fay's Dig. 372.

If the proceedings in which the assignment is made, are void for want of jurisdiction in the officer before whom they are had, an assignment made in the course of such proceedings is likewise void, and vests no legal title in the assignee. The mention of a nominal pecuniary consideration in the assignment is not material. The assignment creates a statutory trust, and conveys no other estate or interest than that required for that purpose, and the assignee is invested with no other trust or interest than that described by the statute, merely by the insertion of a nominal consideration. *Rockwell v. McGovern*, 69 N. Y. 294; see *Rockwell v. Brown*, 11 Abb. Pr. N. S. 400; s. c. 33 N. Y. Supr. Ct. (J. & S.) 380; 42 How. Pr. 226; 54 N. Y. 210; 40 N. Y. Supr. Ct. (J. & S.) 418.

An assignment by the insolvent of all his estate, real and personal, passes the title to all the lands which he owns, without further description, and whether specified in the inventory or not. *Roseboom v. Mosher*, 2 Den. 61. Property conveyed by the debtor in fraud of the rights of creditors, passes to the assignees. Law of 1858, ch. 314; 2 R. S. 6th ed. 146; and see *Ward v. Van Bokkelen*, 2 Paige, 289.

Property held in trust does not pass by the assignment, and if such property remains in specie or in goods, or notes or other choses in action, the *cestui que trust* is entitled to the property, and not the general creditors of the insolvent. *Kip v. Bank of New York*, 10 Johns. 63; see *Kennedy v. Strong*, Id. 289.

The title of the property of the insolvent is not affected by his proceedings in insolvency until actual assignment under the statute. *Bailey v. Burton*, 8 Wend. 339; see *ante*, § 48.

§ 54. *When discharge to be granted.*—"Upon such insolvent's producing a certificate under the hands and seals of the assignees, executed in the presence of such officer, or of two witnesses, and proved by the affidavit of one of them, stating that such insolvent has assigned and delivered, for the use of all his creditors, all his estate so directed to be assigned, and all the books, vouchers and securities relating to the same, and upon his also producing a certificate of the county clerk, that such assignment has been duly recorded in his office, the officer or court who directed such assignment, shall grant to such insolvent a discharge from his debts and from imprisonment, which shall have the effect declared in the succeeding sections of this article." 2 R. S. 21, §§ 29, 34; 3 R. S. 6th ed. 18, § 34; 2 Edm. 22; 1 Fay's Dig. 372.

§ 55. *Proceedings when assignee refuses to sign certificate.*—"Whenever any assignment shall have been executed to one or more assignees, appointed pursuant to the provisions of the third, fourth, fifth or sixth articles of this title, and they, or any of them, shall refuse to sign a certificate of the fact that such assignment has been executed, upon complaint made to the officer or court who directed such assignment, the assignee so refusing shall be cited to appear, and the matter shall be in-

vestigated.” 2 R. S. 38, § 23; 3 R. S. 6th ed. 31, § 23; 2 Edm. 39; 1 Fay’s Dig. 384.

“If it shall appear that such assignment has been duly executed, and that such insolvent has delivered all his estate directed to be assigned, and all the books, vouchers and securities relating to the same, capable of delivery, such officer or court may grant a discharge of the debtor, notwithstanding the refusal of the assignees to certify the fact of an assignment.” 2 R. S. 38, § 24; 3 R. S. 6th ed. 31, § 24; 2 Edm. 39; 1 Fay’s Dig. 385.

“Or, in such case, the officer or court may revoke the appointment of assignees, and grant a certificate of such revocation, which shall be recorded in the office of the clerk of the county; and thereupon the assignment that may have been previously executed to the assignees so refusing to certify, shall be void.” 2 R. S. 39, § 25; 3 R. S. 6th ed. 31, § 25; 2 Edm. 40; 1 Fay’s Dig. 385.

“The officer or court shall thereupon direct a new assignment to be made to such persons as shall be appointed for that purpose; and in case of such new assignment being executed, the certificate of the assignees to the fact, shall be required in the same manner as of the first assignees.” 2 R. S. 39, § 26; 3 R. S. 6th ed. 31, § 26; 2 Edm. 40; 1 Fay’s Dig. 385.

§ 56. *The discharge.*—“This article being a revisal and continuation of the act entitled ‘an act for giving relief in cases of insolvency,’ passed the twelfth day of April, one thousand eight hundred and thirteen, a discharge granted pursuant to the provisions hereof shall discharge and exonerate such insolvent from all debts due at the time of the assignment, or contracted before that time though payable afterwards, founded upon contracts made since the said twelfth day of April, one thousand eight hundred and thirteen, within this State, or to be executed within this State; and from all debts owing to persons resident within this State at the time of the first publication of the notice of the application for such discharge, or owing to persons not residing within this State who united in the petition for his discharge, or who shall accept a

dividend from his estate." 2 R. S. 22, § 30; 3 R. S. 6th ed. 18, § 35; 2 Edm. 22; 1 Fay's Dig. 372.

The reviser's original note to this section (§ 30) is as follows: "In drawing this section, an effort has been made to conform it to the decisions of the Supreme Court of the United States in the cases of *Sturges v. Crowninshield*, 4 Wheat. 122; *McMillen v. McNeil*, Ib. 209, and *Ogden v. Saunders*, 12 Wheat. 213; and to the decision in *Baker v. Wheaton*, 5 Mass. 509. It would be difficult to abstract those cases further than is done by the section itself. It has been thought advisable to declare expressly that this article is a re-enactment of the act of 1813, so as to include contracts made after the passage of that act, according to the decision of the Supreme Court in 19 Johns. 153 (*Matter of Wendell*). The principle in that case was, that no act by which greater facilities are given to obtain a discharge, can affect a contract made previous to its passage. This principle has been scrupulously observed in the revision of this article, while greater facilities have been given to creditors to detect frauds."

§ 57. *Form of the discharge.*—The discharge should be drawn with care. Its recitals are conclusive evidence of the statutory proceedings and facts, except those which are necessary to confer jurisdiction. *Stanton v. Ellis*, 12 N. Y. 575. If it contains a recital of all the facts, showing that the officer had general and special jurisdiction of the case, it is of itself sufficient evidence of the proceedings, without producing the record. *O'Connell v. Sutherland*, 16 Abb. Pr. 460, note; *Barber v. Winslow*, 12 Wend. 102; *Carpenter v. White*, 3 J. B. Moore, 231; *Jenks v. Stebbins*, 11 Johns. 224; *Lester v. Thompson*, 1 Johns. 300. And when it contains such recitals, it furnishes protection to an officer who acts under it, as, for instance, a sheriff who discharges a prisoner. *Bullymore v. Cooper*, 46 N. Y. 236. But the recitals in the discharge are not the only evidence of the regularity of the proceedings. *Bullymore v. Cooper, supra*. Nor does an omission in the discharge to state the performance of an act which is required by the statute to be done, raise a legal presumption that it was not done. *Salters v. Tobias*, 3 Paige, 338.

It is merely *prima facie* evidence of the facts necessary to confer jurisdiction, and it may be avoided in a collateral action by proof of the non-existence of such facts. *Morrow v. Freeman*, 61 N. Y. 515; *Hale v. Sweet*, 40 N. Y. 97; *Stanton v. Ellis*, 12 N. Y. 575.

When the discharge stated that the officer was satisfied that the debtor had conformed in all things to those matters required of him, according to the true intent and meaning of the act, before he directed an assignment, this was held to be a sufficient averment of the facts. *Roosevelt v. Kellogg*, 20 Johns. 208, 211. So if it states that the insolvent has assigned "all his estate, both in law and in equity, in possession, reversion, and remainder," it is enough. *Roosevelt v. Kellogg, supra*. And if it does not except foreign creditors, that does not effect its validity as against creditors of the United States. *Ibid*.

For form of discharge, see *Soule v. Chase*, 1 Abb. Pr. N. S. 48, 49.

§ 58. *When the discharge takes effect.*—The insolvent is discharged from "all debts due at the time of the assignment, or contracted before that time, though payable afterwards, founded upon contracts made since the 12th day of April, 1813." Under the act of 1813, and the construction put upon it in *McNeilly v. Richardson* (4 Cow. 607), the discharge took effect as of the date of the presentation of the petition, but, under the language of the Revised Statutes, the time of making the assignment is the period designated for the discharge to begin to operate. *Anon. Edm. Sel. Cas.* 188; *Thompson v. Hewett*, 6 Hill, 255.

Under a succeeding section (see *post*, § 74), it is provided that the petition and other papers upon which the discharge is granted, shall be filed in the office of the clerk of the county in which the insolvent resided at the time of presenting his petition, or such discharge shall be inoperative until such papers shall be duly filed and recorded. Under this section, where an execution was levied upon a debt otherwise discharged, after the expiration of three months, and before the filing and recording of the papers as required, the court refused relief to the debtor. *Barnes v. Gill*, 13 Abb. Pr. N. S. 169.

§ 59. *What debts may be discharged.*—It seems to be a general and well settled rule, that if the creditor at the time of the assignment by the insolvent debtor has not a certain debt due and owing, to which he can attest by oath so as to entitle him to a dividend of the insolvent's effects, he will not be barred by the discharge. *Mechanics' & Farmers' Bank v. Capron*, 15 Johns. 467; *Gardner v. Lay*, 2 Daly, 113; *Andrus v. Waring*, 20 Johns. 152; *Ransom v. Keyes*, 9 Cow. 128; *Buel v. Gordon*, 6 Johns. 126; *Frost v. Carter*, 1 Johns. Cas. 73. But debts existing, though payable in the future, are within the act. *Workman v. Leake*, Cowp. 22; s. c. Loffts, 433. And where a bond has become forfeited prior to the assignment, and the sum due is capable of liquidation, the demand upon the bond is barred by the discharge. *Clinton v. Hart*, 1 Johns. 375; *Sammon v. Miller*, 3 Barn. & Adol. 596.

So an implied warranty of title of genuineness by one who transfers negotiable paper, if it turns out to be false, is broken the instant of the transfer, and the liability is therefore discharged by a subsequent discharge in insolvency, though the defect be not discovered until after the discharge. *Murray v. Judah*, 6 Cow. 484.

The act does not apply to liabilities for torts, such as libel, trespass, and the like. *Zinn v. Ritterman*, 2 Abb. Pr. N. S. 261; *Crouch v. Gridley*, 6 Hill, 250; *Strong v. White*, 9 Johns. 161; *Owen v. Routh*, 14 Com. Ben. 372; *Lloyd v. Neele*, 2 Chitty, 222; *Lloyd v. Peel*, 3 Bar. & Ald. 407. So under the bankrupt law of 1867. *In re Hennocksburgh*, 7 N. B. R. 37; *In re Sutherland*, 3 Id. 314.

In the case of an action against carriers for a breach of their duty, the cause of action is founded upon a contract, and the plaintiff cannot elude the effect of a discharge by bringing an action sounding in tort. So held under the bankrupt act of 1841. *Campbell v. Perkins*, 8 N. Y. 430.

But when the claim for damages has become a debt by being converted into judgment before the assignment, it is within the statute. *Luther v. Deyo*, 17 Wend. 629; *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Stewart v. Killmar*, 17 Wend. 630, note; *Ex parte Thayer*, 4 Cow. 66; *People v. Marine Court*, 3 Cow. 366; see *Smith v. Bennett*, 17 Wend. 479; *Ex parte Smith*,

5 Cow. 276. So under the late bankrupt law. *In re Hennocksburgh*, 7 N. B. R. 37; *In re Sidle*, 2 N. B. R. 220; *In re Sheehan*, 8 N. B. R. 345.

The report of a referee, or the verdict of a jury, does not change the nature of the demand. *Kellogg v. Schuyler*, 2 Den. 73; *Crouch v. Gridley*, 6 Hill, 250; *Black v. McClelland*, 12 N. B. R. 481; *In re Mayben*, 15 Id. 468; *Wilmer v. White*, 6 Bing. 291.

The discharge does not bar a claim against the insolvent as a factor or trustee for goods delivered to him to be sold for account of the owner or consignor. *Kennedy v. Strong*, 10 Johns. 289, approved s. c. 14 Johns. 128.

Under the bankrupt law, debts created while acting in any fiduciary character were not discharged. See *In re Seymour*, 1 N. B. R. 29; *In re Kimball*, 2 Id. 204; *Lemeke v. Booth*, 5 Id. 351; *Treadwell v. Holloway*, 12 Id. 61; *Meador v. Sharpe*, 14 Id. 490; *Johnson v. Wordin*, 13 Id. 335; *Grover v. Clinton*, 8 Id. 17; *Owsley v. Cobin*, 15 Id. 489; *Coonan v. Cothey*, 104 Mass. 245.

A discharge in bankruptcy does not affect a fine for contempt, and if one is discharged from imprisonment on that ground, he may be re-arrested. *Spaulding v. The People*, 7 Hill, 351; aff'g 10 Paige, 284; aff'd 4 How. U. S. 21; see Chapter VII.

The burden of proof is on the party who seeks to show that a discharge of the debtor does not operate upon a certain claim because not provable at the time of the discharge. *Harrison v. Lourie*, 49 How. Pr. 124.

When it is impossible to determine from the pleadings in a suit whether the plaintiff's claim is on contract or tort, the creditor must establish by other evidence that it is in tort. *Harri-son v. Lourie*, *supra*, Monnell, Ch. J. See *post*, Chapter VI.

A discharge does not operate on continuing contracts so as to permit the bankrupt or insolvent to enjoy the benefits, and exempt him from the liabilities of his contract. *Stinemets v. Ainslie*, 4 Den. 573; *Robinson v. Pesant*, 53 N. Y. 419. Thus a discharge is no bar to an action on an express covenant to pay rent, accruing subsequent to the insolvent's discharge. *Lansing v. Pendergast*, 9 Johns. 127; *Frost v. Carter*, 1 Johns. Cas. 73; see *Hendricks v. Judah*, 2 Caines,

25 ; *Stinemets v. Ainslie*, *supra* ; *Newton v. Scott*, 9 M. & W. 434 ; s. c. 10 Id. 470. Nor is it a bar to an action brought by the assignee of a policy of insurance against the defendant for not paying the annual premium to keep the insurance on foot. *La Coste v. Gilliman*, 1 Price, 315 ; *Bennett v. Burton*, 4 Per. & Dav. 313.

§ 60. *Discharge of sureties—Bail.*—The discharge of the principal debtor under the insolvent law, does not, as a general principle, discharge the surety. *Buel v. Gordon*, 6 Johns. 126 ; *Hall v. Fowler*, 6 Hill, 630 ; *Bowery Sav. Bank v. Clinton*, 2 Sandf. 113 ; *Storms v. Waddell*, 2 Sandf. Ch. 494 ; *Page v. Bussell*, 2 M. & S. 551 ; *Welsh v. Welsh*, 4 M. & S. 333 ; *Soulten v. Soulten*, 5 B. & Ald. 852 ; but see *More v. Paine*, 12 Wend. 123. Such is the express provision of the bankrupt act. R. S. U. S. § 5118.

And bail are not discharged by the discharge of their principal after they have become fixed. *Hall v. Fowler*, 6 Hill, 630.

But before the liability of the bail has become fixed, the discharge of the principal operates as an *exoneretur*. *Kane v. Ingraham*, 2 Johns. Cas. 403 ; *Merchants' Bank v. Moore*, 2 Johns. 294. But if the defendant fail to plead his discharge through neglect, the bail cannot be discharged on motion after judgment. *Post v. Riley*, 18 Johns. 54.

If the surety pay the debt after the principal is discharged, it is not altogether free from doubt whether he can recover against the discharged principal. It has been held that a discharge under the bankrupt law of 1841 was a bar to an action for contribution brought by a surety against his discharged co-surety. *Tobias v. Rogers* (13 N. Y. 59), and in *Mace v. Wells* (7 How. U. S. 272), under the same act, it was held that where a surety on a note had paid it after the maker had been discharged in bankruptcy, the surety had lost his recourse against the maker. See *Morse v. Hovey*, 1 Sandf. Ch. 187, and under the bankrupt law of 1867, see *Reily v. The People*, 16 N. B. R. 96. The principle of these decisions is that the surety might have proved his debt in bankruptcy, but under our statute the surety could not prove his claim until after payment, and when the payment is not made until after the discharge is granted, his claim against the principal is not barred. *Buel v.*

Gordon, 6 Johns. 126; and see *Powell v. Eason*, 8 Bing. 23; *Hocken v. Browne*, 4 Bing. N. C. 400; *Abbott v. Bruere*, 5 Bing. N. C. 598; *Emery v. Clarke*, 2 C. B. N. S. 591; *Litten v. Dalton*, 17 C. B. N. S. 178.

§ 61. *Discharge of joint debtors*.—Where one of two joint debtors is discharged from all his debts, that is a discharge from his joint as well as his separate debts. *Willson v. Gomperts*, 11 Johns. 193; see *Robertson v. Smith*, 18 Johns. 459. But the discharge of one joint debtor does not discharge the others. *Tooker v. Bennett*, 3 Cai. 4; *Moore v. Paine*, 12 Wend. 123, 125. See *Alger v. Raymond*, 7 Bosw. 418. So under the bankrupt law of 1867; see U. S. R. S. § 5718.

If, after the discharge of one, the other joint debtor pays the debt, he may then have his action over against the discharged debtor. *Ford v. Andrews*, 9 Wend. 312; *Frost v. Carter*, 1 Johns. Cas. 73; see *Ellsworth v. Caldwell*, 18 Abb. Pr. 20; s. c. 27 How. Pr. 188; 48 N. Y. 680.

§ 62. *Judgments*.—A discharge extinguishes a previous judgment, and where the judgment creditor proceeded to enforce such a judgment by arresting the judgment debtor, both he and the attorney who issued the execution, were held liable in an action for false imprisonment. *Deyo v. Van Volkenburgh*, 5 Hill, 242. This, of course, will not prevent the judgment creditor from bringing an action upon the judgment in which the validity of the discharge can be tried.

Under the insolvent laws a case rarely happens where a judgment is recovered intermediate the assignment and the discharge. Under the bankrupt laws the question has frequently arisen, whether such a judgment merges the original claim and becomes a new debt arising subsequent to the filing of the petition.

In this State it is now settled that where the judgment is obtained after the discharge upon a debt provable in bankruptcy, the judgment is not a new debt. *Monroe v. Upton*, 50 N. Y. 593, 597; *Clark v. Rowling*, 3 N. Y. 216; *Dresser v. Brooks*, 3 Barb. 429; *Fox v. Woodruff*, 9 Barb. 498; *In re Stevens*, 4 N. B. R. 122; *In re Brown*, 3 Id. 145; *In re Vickery*, 3 Id. 171; but see *Thompson v. Hervitt*, 6 Hill, 254; *Kel-*

logg v. Schuyler, 2 Den. 73; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *In re Williams*, 3 N. B. R. 74; *In re Gallison*, Id. 353; *Mansfield's Case*, 6 Id. 388.

But where a judgment for costs is given against a party who has obtained a discharge while the action was pending, the discharge does not bar a recovery on the judgment. *Stebbins v. Willson*, 14 Johns. 403; *Gardner v. Lay*, 2 Daly, 113; see *Wilkins v. Warren*, 14 Shipley (Me.) 438. It was held otherwise in the case of a discharge under the bankrupt act of 1841. *Leavitt v. Baldwin*, 4 Edw. Ch. 289.

Where a bankrupt recovers costs, after his discharge, against a creditor, the creditor cannot have such costs offset against the amount which was due to him before the discharge. *Mickles v. Brayton*, 10 Paige, 138.

Where a judgment is given against an insolvent for costs, before the discharge, it is immaterial whether the costs are or are not taxed before the discharge. They are capable of liquidation, and the judgment is discharged. *Waine v. Constant*, 5 Johns. 135; *Thomas v. Striker*, 3 Johns. Cas. 91; s. c. 5 Johns. 135, note.

In *Cone v. Whitaker* (2 Johns. Cas. 280), the judgment of non-suit was entered prior to the discharge, but the costs were not taxed until after the discharge, it was held that the costs were not a debt until taxation, and of course were not affected by the discharge. In the case of *Waine v. Constant* (5 Johns. 135), this rule seems to be shaken. It was there held, that where the judgment of non-suit is before the discharge, although the roll may be signed, and costs taxed afterwards, still the costs are barred by the discharge.

Where the plaintiff, in an action commenced before he obtains a discharge, is non-suited, in such action, after the discharge, the costs of the action are not affected by the discharge. *Stebbins v. Willson*, 14 Johns. 403.

Where an action was brought on a judgment obtained after the passage of the act, upon debts contracted prior to the act, it was held that the plaintiff might go behind the judgment to show the date of the contract for the purpose of evading a subsequent discharge under the insolvent laws. *Wyman v. Mitchell*, 1 Cow. 316.

And in *Lester v. Christalar* (1 Daly, 29), where the action was upon a judgment obtained in this State by a non-resident, it was held that the judgment did not constitute a new debt, so as to render it a contract made within this State. See *Raymond v. Merchant*, 3 Cow. 147.

§ 63. *Discharge of liability as indorser or maker of note.* —“With respect to all contracts which shall be made after this article shall commence and take effect as a law, every such discharge shall also exonerate such insolvents from all liabilities incurred by him by making or indorsing any promissory note, or bill of exchange, previous to the execution of his assignment; or incurred by him in consequence of the payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior or subsequent to the execution of the assignment by such insolvent.” 2 R. S. 22, § 31; 3 R. S. 6th ed. 18, § 36; 2 Edm. 23; 1 Fay’s Dig. 372.

The insolvent act of 1813, extended the discharge only to such debts as were due at the time of the assignment of the insolvent’s estate, and debts contracted before that time, though payable afterwards. Therefore, if an indorser of a promissory note paid it after the maker had been discharged under the insolvent act, he could still recover the amount from the maker, whose discharge would be no bar to the action. *Frost v. Carter*, 1 Johns. Cas. 73; s. c. 2 Caines, 311; *Mechanics & Farmers Bank v. Capron*, 15 Johns. 468; *Ainslie v. Wilson*, 7 Cow. 662. The act of 1819 (Laws of 1819, p. 118, § 11), went so far in changing the law as so pronounced, as to exonerate, by the discharge, the indorser of a promissory note, though the note had not become due at the time of the discharge, and permitted the holder to come in for a dividend in the same manner as if the bill was due. The Revised Statutes (1830) extended the protection of the discharge to the maker as well as the indorser of a promissory note. *Ford v. Andrews*, 9 Wend. 312.

Where the holder of a dishonored note joined in a petition for a discharge of the maker, a prior indorser who subsequently took up the note, was held to have done so in his own wrong, when under no legal obligation to do so, and therefore he had

no remedy over against the discharged maker. *Lynch v. Reynolds*, 16 Johns. 41.

The effect of a discharge upon negotiable paper is to destroy its negotiability. It discharges the debt for which the note is given; the note becomes *functus officio*, and the person to whom it is transferred after the discharge, acquires no right to maintain an action upon it. *Dupuy v. Swartz*, 3 Wend. 135; *Moore v. Viele*, 4 Id. 420.

§ 64. *Debts due the United States*.—"No debt or duty to the United States shall be in any way affected by a discharge under the provisions of this title; nor can any debtor of the United States be discharged or exonerated from imprisonment by any proceedings under this title, in any suit or proceeding founded upon a debt to the United States." 2 R. S. 39, § 29; 3 R. S. 6th ed. 32, § 29; 2 Edm. 40; 1 Fay's Dig. 385.

§ 65. *Debts due the State of New York*.—"All debts and duties to this State, except for taxes, and for money received or collected by any person as a public officer, or in a fiduciary capacity, shall be affected by proceedings under this title, in the same manner as debts to individuals; and debtors may be discharged and exonerated from imprisonment, in suits brought in the name of the State, in the same manner as in suits by individuals (except for money received or collected as aforesaid), and in such cases, whenever it shall be necessary to serve any notice upon plaintiffs, according to the provisions of this title, the same may be served on the attorney-general, who shall, in all proceedings under this title, represent the State." 2 R. S. 39, § 30, as amended by Laws of 1859, ch. 2; 3 R. S. 6th ed. 32, § 30; 2 Edm. 40; 1 Fay's Dig. 385.

Previous to the Revised Statutes, it had been decided that the people of the State were not bound by the insolvent laws, unless expressly named. *People v. Herkimer*, 4 Cow. 345; *People v. Rossiter*, Id. 143; *Anon.* 1 Atk. 262; *Rex v. Pixley*, Bunb. 202.

§ 66. *Discharge, how pleaded; when a bar*.—"In any action which shall be brought against such insolvent or his

personal representatives, a discharge granted pursuant to the provisions of this article may be pleaded or given in evidence under the general issue and notice thereof, in bar of any action upon any contract made by such insolvent since the said twelfth day of April, one thousand eight hundred and thirteen, within this State, or to be executed within this State ; or made with persons resident within this State at the time of the first publication of the notice of the application for such discharge ; or made with persons not residing within this State, who shall have united in the petition for such discharge, or who shall accept a dividend from the estate of such insolvent ; and in bar of any action upon any liability of such insolvent, incurred by making or indorsing any promissory note or bill of exchange previous to the execution of his assignment ; or incurred by him in consequence of the payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior or subsequent to the execution of the assignment by such insolvent." 2 R. S. 22, § 32 ; 3 R. S. 6th ed. 19, § 37 ; 2 Edm. 23 ; 1 Fay's Dig. 372.

§ 67. *When the discharge must be pleaded.*—When the discharge is obtained before an action is brought, or while it is pending, the debtor must plead the discharge. It will be of no avail unless pleaded. *Cornell v. Dakin*, 38 N. Y. 253. And when the discharge is obtained after the action is commenced, it is not a matter of course to permit the defendant to plead it by supplemental answer. Where the defendant has been guilty of laches or fraud, or a strong case of injustice would arise by permitting the defense, the application to plead the discharge will be denied. *Holyoke v. Adams*, 59 N. Y. 233 ; aff'g 8 N. Y. Supm. (1 Hun), 223. Thus, in the case of *Medbury v. Swan* (46 N. Y. 200), a delay of fifteen months was fatal ; and in *Bartow v. Harmer* (9 N. Y. Supm. Ct. R. [2 Hun], 333), the court denied an application to plead a discharge in bankruptcy when a long time had elapsed and the laches were unexplained. See *Mechanics' Bank v. Hazard*, 9 Johns. 392 ; *Scott v. Grant*, 10 Paige, 485 ; *Carter v. Goodrich*, 1 How. Pr. 238 ; *Stewart v. Isidor*, 5 Abb. N. S. 68.

If the defendant neglects to plead the discharge, having had an opportunity to do so, the court will not, as a rule, afterwards

relieve him against the judgment on motion. *Rudge v. Rundle*, 1 N. Y. Supm. (T. & C.) 649; *Price v. Peters*, 15 Abb. Pr. 197; *Valkenburgh v. Dederick*, 1 Johns. Cas. 134; *Palmer v. Hutchins*, 1 Cow. 42; *Mechanics' Bank v. Hazard*, 9 Johns. 392; *Disobry v. Morange*, 18 Id. 336; *Parkinson v. Scoville*, 19 Wend. 150; *Stewart v. Green*, 11 Paige, 535. And where the defendant obtained his discharge after the testimony was closed, it was held that he should have applied for leave to plead in the action, and could not be relieved on motion after judgment. *Price v. Peters*, *supra*. But where the debtor was arrested on a judgment rendered upon the same day upon which he obtained his discharge under the insolvent act, it was held that he was entitled to relief by motion. *Baker v. Judges of Ulster Co.* 4 Johns. 191. And this is the rule when the discharge comes too late to be pleaded, or where the defendant, for any reason, has no opportunity of interposing it as a defense. *Baker v. Taylor*, 1 Cow. 165; *Palmer v. Hutchins*, 1 Cow. 42; *Monroe v. Upton*, 50 N. Y. 593; *Dresser v. Brooks*, 3 Barb. 429; *Cornell v. Dakin*, 38 N. Y. And it has been held that where the plaintiff, in such a case, disputes the validity of the discharge, the judgment will be opened to permit the determination of that question. *Moffot v. Van Buren*, 1 Cow. 44, note; *Baker v. Taylor*, 1 Cow. 165; *Hall v. Gordon*, 1 How. Pr. 100. But where the debtor might have availed himself of the discharge as a defense to the action, or has been guilty of gross laches in making the motion, relief will be denied him. *Valkenburgh v. Dederick*, 1 Johns. Cas. 133; *Cross v. Hobson*, 2 Caines' Cas. 102.

§ 68. *Manner of pleading discharge*.—Under the old practice it was necessary that the plea should state facts sufficient to show that the officer acquired jurisdiction. *Service v. Hermance*, 1 Johns. 91; *Roosevelt v. Kellogg*, 20 Johns. 208; *Hines v. Ballard*, 11 Johns. 491; *Frary v. Dakin*, 7 Johns. 75; *Sackett v. Andross*, 5 Hill, 327; *Spencer v. Beebe*, 17 Wend. 557; *Turner v. Beale*, 2 Salk. 521; *Ladbroke v. James*, Willes, 199. But it is no longer necessary to state the facts conferring jurisdiction. It is sufficient to state that the determination of the officer has been duly given or made. *Livingston v. Oak-*

smith, 13 Abb. Pr. 183; *Hunt v. Dutcher*, 13 How. Pr. 538. See Code of Civ. Pro. § 532.

But since the statute is in terms restricted to certain prescribed debts, it is necessary that the debtor should show that the debt to which he seeks to have the discharge applied was within the prescribed clauses. Thus the pleading must show that the debt was owing to a person resident within this State at the time of the first publication of the notice of the application for the discharge, or owing to persons not residing within the State, who united in the petition for the discharge, or who accepted a dividend from the estate. *Smith v. Bennett*, 17 Wend. 479.

When a defendant relies upon a discharge in bankruptcy in another country as a bar to the action, he must set forth in his answer the statute under which the alleged proceedings were had, and certificate granted, and also such prior proceedings as warranted the granting of the certificate. *Philips v. James*, 1 Abb. Pr. N. S. 311.

§ 69. *Discharge, how available after judgment.*—If the discharge is obtained after judgment, the proper course for the judgment debtor, is to apply for a perpetual stay of execution, on motion. *Clark v. Rowling*, 3 N. Y. 216, 227; *Mather v. Bush*, 16 Johns. 233; *Dresser v. Shufeldt*, 7 How. Pr. 85; *Russell & Erwin Mfg. Co. v. Armstrong*, 10 Abb. Pr. 258; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Alcott v. Avery*, Id. 347. Formerly the relief in such cases was by *audita querela*. *Clark v. Rowling*, *supra*.

§ 70. *Impeaching the discharge in an action.*—The certificate of discharge, when it contains recitals of all the jurisdictional matters is evidence of the regularity of the proceedings, and furnishes *prima facie* proof of a valid discharge (see § 57, *ante*), but whenever the discharge is proved in an action, either by the certificate or by the record of the proceedings, it is open to attack upon any of the grounds mentioned in the succeeding section (see § 76, *post*), or for any defect in the jurisdiction of the officer granting it. *Morrow v. Freeman*, 61 N. Y. 515,

517; *Stanton v. Ellis*, 12 N. Y. 575; *Hale v. Sweet*, 40 N. Y. 97; *Small v. Wheaton*, 2 Abb. Pr. 175, 178.

But no objection touching the regularity of the proceeding merely, and not relating to the jurisdiction of the officer, can be raised in a collateral proceeding. The proper remedy in such cases is by a direct review of the proceedings on *certiorari* or by appeal. *People v. Stryker*, 24 Barb. 650; *Rusher v. Sherman*, 28 Id. 416; *Soule v. Chase*, 39 N. Y. 342.

§ 71. *Impeaching the discharge, on motion.*—On a motion to set aside an execution, or for a perpetual stay, on the ground that the judgment has been discharged, the validity of the discharge will not be tested upon affidavits. *Noble v. Johnson*, 9 Johns. 259; *Manhattan Oil Co. v. Thorn*, 14 Abb. Pr. 291, note; *Wall v. Thorn*, Id. 292, note; *Russell & Erwin Mfg. Co. v. Armstrong*, 10 Abb. Pr. 258, note; *Dresser v. Shufeldt*, 7 How. Pr. 85; *Deyo v. Van Valkenburgh*, 5 Hill, 245; *Russell v. Packard*, 9 Wend. 431; *Rich v. Salinger*, 11 Abb. Pr. 344; s. c. 14 Id. 294; see *Am. Flask & Cap Co. v. Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333; *Gardner v. Lay*, 2 Daly, 113. But it does not follow that the execution must necessarily be set aside. In a proper case the court will retain the levy, and direct a reference or an issue to test the validity of the discharge. *Stuart v. Solhinger*, 14 Abb. Pr. 291; *Cramer v. ———*, 3 Sandf. 700 (where the proper form of the order is specified), or the court may open the judgment and permit the validity of the discharge to be tried in the action. *Baker v. Taylor*, 1 Cow. 165; *Moffot v. Van Buren*, 1 Cow. 44, note; *Palmer v. Hutchins*, 1 Cow. 42; *Bang v. Strong*, 1 How. Pr. 181. See this case commented on in *Dresser v. Shufeldt*, 7 How. 85.

§ 72. *Debts due non-resident creditors not discharged.*—It is the settled law that a discharge under our insolvent acts operates upon all contracts made between citizens of this State subsequent to the passage of the act. The discharge is in such a case held not to impair the obligation of contracts, because, being made after the law, the parties are presumed to have had reference to the law, and impliedly to have made it a part of

the contract. Nelson, Ch. J., in *Wyman v. Mitchell*, 1 Cow. 316, 321; *Mather v. Bush*, 16 Johns. 233; *Roosevelt v. Cebra*, 17 Id. 108; *Sturgis v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacherie*, 6 Pet. 348; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297; *Jacques v. Marquand*, 6 Cow. 497; *Donnelly v. Corbett*, 7 N. Y. 500.

In the Matter of Wendell (19 Johns. 153), where the debt was contracted in 1812, after the repeal of the act of 1811 (see *ante*, § 4), and while the act of 1801 was in force, which authorized a discharge on the petition of three-fourths in amount of all the creditors, and a debtor subsequently obtained a discharge under the act of 1813, which permitted a discharge on the petition of two-thirds in amount of the creditors, it was held that the greater facilities afforded by the latter act so materially changed the law in force at the time of making the contract, as to render the discharge ineffectual as to that debt.

Debts due to non-resident creditors are governed by different rules.

The law, as it stood under the statutes previous to 1830, attempted to discharge foreign as well as domestic debts, if two-thirds of all the creditors in amount, including such debts, had united in the petition. Under the Revised Statutes, however, these provisions are omitted. The revisers say, that the whole current of authority settles, beyond dispute, that foreign creditors cannot be affected by a discharge without their consent. They have, in the present statute, attempted to provide for four classes of cases in which the debt shall be discharged: *First*, where the contract was made within this State; *Second*, where the contract was to be executed within this State; *Third*, where the creditor, at the time of first publication of notice, was a resident of this State; and *Fourth*, where the creditor, being a non-resident, either united in the petition for a discharge, or has accepted a dividend from the insolvent's estate. *Parkinson v. Scoville*, 19 Wend. 150. But, as we shall see, the distinction taken by the first two classes named, has been finally determined by the courts to be for this purpose quite immaterial. It makes no difference where the contract was made, or where it was to be executed; the sole question is

whether the parties are residents of the State, so as to be within the operation of its laws. *Pratt v. Chase*, 44 N. Y. 597.

It appears to have been formerly supposed that whatever effect might be given to a discharge granted by the courts of this State, when brought in question in a foreign tribunal, that such a discharge was a bar to all suits brought here upon antecedent contracts wherever made. *Penniman v. Meigs*, 9 Johns. 328 (1812). But this doctrine was overruled in the Supreme Court of the United States, in *McMullan v. McNeil* (4 Wheat. 409; *Ogden v. Saunders* (12 Wheat. 213). See remarks of Kent, Chan., in *Hicks v. Hotchkiss* (7 Johns. 409). It was still supposed that when the contract was made here, although by non-residents of the State, or where, by its terms, it was to be executed here, a discharged under our insolvent laws would be a bar to an action here. *Parkinson v. Scoville*, 19 Wend. 150; *Matter of Wendell*, Id. 153; *Sherrill v. Hopkins*, 1 Cow. 103; *Blanchard v. Russell*, 13 Mass. 16; *Scribner v. Fisher*, 2 Gray, 43. But these cases were overruled in the Supreme Court of the United States, in *Baldwin v. Hall* (1 Wall. 223; s.c. 3 Am. L. Reg. N. S. 462, and note). See Daly, J., in *Lester v. Christalar* (1 Daly, 29, 30).

And in the case of *Donnelly v. Corbett* (7 N. Y. 500), it was held that a debt contracted by a citizen of South Carolina, to a citizen of this State, was not discharged by a subsequent discharge under the insolvent laws of South Carolina, and that the discharge was no bar to an action here. See *Van Hook v. Whitlock*, 26 Wend. 42.

It is now settled by the decisions of the Supreme Court of the United States, as well as by the decisions of our own State, that insolvent laws have no extra-territorial efficacy, and are wholly ineffectual against non-residents of the State, even though the contract was by its terms to be performed in the State granting the discharge, unless indeed such non-resident creditor voluntarily becomes a party to the insolvent proceedings or claims, or accepts a dividend thereunder. *Ogden v. Saunders*, 12 Wheat. 213; *Cook v. Moffat*, 5 How. (U. S.) 309; *Boyle v. Zacherie*, 6 Pet. 348; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Kelly v. Drury*, 9 Allen (Mass.) 27; *Soule v. Chase*, 39 N. Y. 342, rev'g s. c. 1

Robt. 222; *Pratt v. Chase*, 44 N. Y. 597; rev'g 29 How. Pr. 296; s. c. 19 Abb. Pr. 150; *Donnelly v. Corbett*, 7 N. Y. 500; *Smith v. Gardner*, 4 Bosw. 54; *Ballard v. Webster*, 9 Abb. Pr. 404. The cases of *Olyphant v. Atwood* (4 Bosw. 459) and *Ritchie v. Garrison* (10 Abb. Pr. 246), must be regarded as overruled in the later cases cited, although no allusion appears to have been made to them.

The fourth class of debts which the statute discharges come within the exception to the rule just stated. It includes contracts "made with persons not residing within the State who shall have united in the petition for such discharge, or who shall accept a dividend from the estate of such insolvent." The authorities are uniform that a discharge under such circumstances is a bar to any claim by the non-resident creditor. *Clay v. Smith*, 3 Pet. 411; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Van Hook v. Whitlock*, 7 Paige, 373; aff'g 26 Wend. 43; *Soule v. Chase*, 39 N. Y. 342.

The fact that the foreign creditor resorts to the courts of this State, and obtains a judgment, is not such a submission or assent to the jurisdiction of this State as to entitle it to release by a discharge under its insolvent laws the debt or obligation created by the judgment. *Donnelly v. Corbett*, 7 N. Y. 500; *Soule v. Chase*, 39 N. Y. 342, 344; *Lester v. Christalar*, 1 Daly, 29, 31; *Worthington v. Jerome*, 5 Blatch. 279; *Watson v. Bourne*, 10 Mass. 337. See this principle questioned, and the case last cited criticised in *Ogden v. Saunders*, 12 Wheat. 213, 364, Johnson, J.

Residence within the meaning of the insolvent laws is not equivalent to citizenship. A creditor resident and domiciled in the State at the time the debt was contracted and the discharge obtained is bound by the proceedings, although he be an alien. *Van Glahn v. Varrenne*, 1 Dill. 515.

But it has been held that when a contract has been entered into between two citizens of the same State, within the State, one of whom afterwards removes, and the other obtains a discharge under insolvent laws in force when the contract was made, the discharge will be a bar to an action on the contract. *Stoddard v. Harrington*, 100 Mass. 87.

A State law discharging the person of a debtor from arrest

for debt is valid, and not within the prohibition of the Constitution, whether the debt was contracted before or after the law. *Sturgis v. Crowninshield*, 4 Wheat. 91; *Ogden v. Saunders*, 12 Wheat. 213; *Mason v. Haile*, 12 Wheat. 370; *Beers v. Houghton*, 9 Pet. 329; *Woodhull v. Wagner*, Baldw. 296; *Lee v. Gumble*, 3 Cranch C. C. 374; *In re Jacobs*, 12 Abb. Pr. N. S. 273; *Shears v. Solhinger*, 10 Abb. Pr. N. S. 287.

For the reason that the right to arrest is a part of the remedy only. For the same reason such a law can have no effect out of the jurisdiction of the State granting it. A debtor who has been thus discharged, if the debt has not been barred, may be sued here, and, in a proper case under our law, may be arrested and held to bail, notwithstanding the discharge. *Wright v. Paton*, 10 Johns. 300; *Smith v. Spinola*, 2 Id. 198; *White v. Canfield*, 7 Id. 117; *Secord v. Whale*, 11 Id. 194; *Peck v. Hozier*, 14 Id. 346.

§ 73. *Discharge exonerates from arrest or imprisonment.*—"Every such discharge shall also exonerate the insolvent to whom it shall be granted from any arrest or imprisonment thereafter, in any suit, or upon any proceedings founded upon any debt whatever, contracted by him previous to the execution of the assignment of his estate, as herein directed; or in any suit, or upon any proceeding, founded upon any liabilities incurred by him by making or indorsing any promissory note or bill of exchange, previous to the execution of his assignment; or incurred by him in consequence of the payment, by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior or subsequent to the execution of his assignment." 2 R. S. 22, § 33; 3 R. S. 6th ed. 19, § 38; 2 Edm. 23; 1 Fay's Dig. 373.

"If such insolvent be in prison in any suit or proceeding, founded upon any contract or liability, in which he is exempted from imprisonment according to the last section, he shall be discharged therefrom, upon producing the discharge granted pursuant to the provisions of this article, and upon indorsing his appearance on any *mesne* process upon which he may be so imprisoned." 2 R. S. 23, § 34; 3 R. S. 6th ed. 19, § 39; 2 Edm. 24; 1 Fay's Dig. 373.

“If any insolvent, discharged under the third, fourth,¹ fifth,² or sixth³ articles of this title, shall be arrested on *mesne* process, in a suit upon any debt or liability in which he is exempt from imprisonment, as in those articles declared, and shall apply to any officer to discharge him from such arrest, such officer shall cause reasonable notice to be given to the plaintiff in such suit, to show cause why such insolvent should not be discharged from such arrest.” 2 R. S. 38, § 21; 3 R. S. 6th ed. 31, § 21; 2 Edm. 39; 1 Fay’s Dig. 384.

“The plaintiff in such suit may show, as cause against such discharge, any fraud committed by such insolvent in obtaining his discharge, or any cause for avoiding such discharge, declared in the said articles; and such officer may require such insolvent to be held to bail in such process as if no such discharge had been granted.” 2 R. S. 38, § 22; 3 R. S. 6th ed. 31, § 22; 2 Edm. 39; 1 Fay’s Dig. 384.

When the defendant is arrested on *mesne* process, and applies for discharge from such arrest on the ground of his discharge under the insolvent laws, it is specially provided, by the last two sections cited, that the plaintiff may show, as cause against such discharge, any fraud committed by such insolvent in obtaining his discharge, or any cause for avoiding such discharge declared in the said articles. As to the practice previous to the Revised Statutes, see *Am. Flask & Cap Co. v. Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333. But this provision does not extend to arrest on execution, which still appears to be governed by the first section: *Dresser v. Shufeldt*, 7 How. 85, 89, Mitchell, J. And in such cases it appears that the rule is, that the validity of the discharge cannot be questioned on motion. *Reed v. Gordon*, 1 Cow. 50; *Noble v. Johnson*, 9 Johns. 259; *O’Connor v. Debraine*, 3 Edw. Ch. 231; *Russell v. Packard*, 9 Wend. 431 (see remarks on this case in *Am. Flask & Cap Co. v. Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333. It should be observed, however, that *Russell v. Packard* was the case of an arrest on *ca. sa.*, and not on *mesne* process, and therefore did not come within §§ 21, 22); *Reed v. Gordon*, 1 Cow. 50; *Noble v. Johnson*, 9 Johns. 259.

¹ Chapter V, *post*.

² Chapter VI, *post*.

³ Chapter VII, *post*.

Where the question is not upon the validity of the discharge, but upon its applicability to a particular debt, the question may properly be determined on motion. *Gardner v. Lay*, 2 Daly, 113.

But it seems that under this statute, if the discharge is ineffectual as to the debt, it is equally so as to the remedy against the person. *Witt v. Follett*, 4 Wend. 501. In that case the defendant had obtained his discharge under the act of 1813, which he interposed as a defense to a note made in New Hampshire while both parties were residents of that State, the discharge was held ineffectual. The defendant then sought to have the discharge declared effectual to exempt him from arrest on the debt, on the ground that to that extent the discharge operated on the remedy only, and was not open to the objection made to the discharge of the contract. The court held that the object of the act was to discharge the debt, and the discharge of the person was only an incident which accompanied an actual discharge of the debt.

§ 74. *Filing and recording papers*.—"All proceedings under the second,¹ third, fourth² and fifth³ articles of this title shall be filed with the officer before whom the same shall have been consummated, within three months thereafter, with the clerk of the county in which such officer resides." 2 R. S. 39, § 27; 3 R. S. 6th ed. 32, § 27; 2 Edm. 40; 1 Fay's Dig. 385.

"Every assignment executed under the third, fourth,⁴ fifth,⁵ and sixth⁶ articles of this title, shall be recorded by the clerk of the county in which it was executed, upon being acknowledged or proved in the same manner as deeds of real estate, and such original assignment, the record thereof and the transcript of such record, shall be received in evidence, in the same manner and with the like effect as deeds of real estate duly recorded." 2 R. S. 38, § 20; 3 R. S. 6th ed. 31, § 20; 2 Edm. 39; 1 Fay's Dig. 384.

"Every discharge granted under the third, fourth,⁷ and fifth⁸

¹ 2 R. S. Chap. 5, Title 1, Art. 2.

³ Chapter VI, *post*.

⁵ Chapter VI, *post*.

⁷ Chapter V, *post*.

² Chapter V, *post*.

⁴ Chapter V, *post*.

⁶ Chapter VII, *post*.

⁸ Chapter VI, *post*.

articles of this title, shall be recorded by the clerk of the county in which it was granted; and the original discharge, the record thereof and a transcript of such record, duly authenticated, shall be conclusive evidence of the proceedings and facts therein contained. All the petitions, affidavits, schedules, inventories, order and other papers upon which any such discharge shall be hereafter granted, shall, within three months from the granting thereof, be filed and recorded by the clerk of the county in which the insolvent resided at the time of the presentation of his petition, or such discharge shall be thereafter inoperative, until such papers shall be duly filed and recorded as aforesaid. The record thereof, and a transcript of such record, duly authenticated, shall be presumptive evidence of the facts and proceedings therein contained. The clerk shall receive five cents per folio for recording said papers, and no other fee for filing the same." 2 R. S. 38, § 19; amended Laws of 1866, ch. 116; 3 R. S. 6th ed. 31, § 19; 6 Edm. 701; 1 Fay's Dig. 384.

The object of the statute was to give publicity and permanence to the proceedings for a discharge. It was intended for the benefit of creditors, that they might be able to know how the discharge had been obtained, so as to facilitate an investigation as to fraud. Learned, J., in *Barnes v. Gill*, 13 Abb. Pr. N. S. 169, 172.

The statute gives the debtor three months within which to file the papers, and probably if the papers are filed within that time, the discharge operates from the time it was granted.

If he fails to file the papers within that time, the discharge is of no effect until the papers are so filed; but if any rights to property have become, in the meantime, vested, they will not become effected by the discharge. Thus, where the discharge was granted August 16th, 1866, but the papers were not filed until August 2, 1872, an execution issued upon a judgment on debt which would otherwise have been discharged, was sustained. *Barnes v. Gill*, 13 Abb. Pr. N. S. 169, 172.

§ 75. *Plaintiff may discontinue without costs where defendant is discharged.*—A plaintiff will be permitted to discontinue without costs upon showing that the defendant has been discharged under the insolvent act after suit brought. *Case v.*

Belknap, 5 Cow. 422; *Merritt v. Arden*, 1 Wend. 91; *Ludlow v. Hackett*, 18 Johns. 252; *Hellman v. Licher*, 9 Abb. Pr. N. S. 288. But mere insolvency of the defendant will not furnish a ground for discontinuance without costs; there must be an actual discharge under the act. *Collins v. Evans*, 6 Johns. 333.

§ 76. *A new promise takes the debt out of the operation of the discharge.*—While it is true that the legal obligation to pay a debt discharged by the insolvent or bankrupt laws is terminated, and the remedy of the creditor is barred, yet the debt is not paid by the discharge, and the moral obligation to pay it remains, and this moral obligation is sufficient consideration to support a promise, on the part of the debtor, to pay the discharged debt. *McNair v. Gilbert*, 3 Wend. 344; *Sconton v. Eislord*, 7 Johns. 37; *Trueman v. Fenton*, Cowp. 544; *Erwin v. Saunders*, 1 Cow. 249.

A new promise to revive such a debt must be distinct, unambiguous, and certain (*Stern v. Nussbaum*, 47 How. 489; see *Geery v. Buckner*, 4 N. Y. Leg. Obs. 344), and it must be made after the discharge and not merely after the presentation of the petition. *Stebbins v. Sherman*, 1 Sandf. 510; see *Stilwell v. Coope*, 4 Den. 225.

It is proper for the plaintiff, after a new promise to pay a discharged debt, to bring his action upon the original claim and not upon the new promise. *Dusenbury v. Hoyt*, 53 N. Y. 521, aff'g 45 How. Pr. 147; *McNair v. Gilbert*, 3 Wend. 344; *Wait v. Morris*, 6 Id. 394; *Fitzgerald v. Alexander*, 19 Id. 402.

§ 77. *Discharge, when void.*—"Every discharge granted to an insolvent under this article, shall be void in each of the following cases :

"1. If such insolvent shall have willfully sworn false, in his affidavit annexed to his petition, or upon his examination, in relation to any material fact concerning his estate or his debts, or to any other material fact ;

"2. If, after the presentation of his petition, he shall sell, or in any way transfer or assign any of his property, or collect

any debts due him, and shall not give a just and true account thereof on the hearing of his application ; and shall not also pay, or secure the payment, of the money so collected, or the value of the property so assigned, as herein before directed ;

“ 3. If he shall secrete any part of his estate, or any books or writings relative thereto, with intent to defraud his creditors ;

“ 4. If he shall fraudulently conceal the names of any of his creditors, or the amount of any sum due to any of them ;

“ 5. If, in order to obtain his discharge, he shall procure any person to become a petitioning creditor, for any sum not due from him to such person in good faith ;

“ 6. If he shall pay, or consent to the payment of any portion of the debt or demand of any of his creditors, or shall grant or consent to the granting of any gift, or reward to any such creditor, upon an express or implied contract or trust, that the creditor so paid or rewarded should become a petitioner in behalf of such insolvent, or that he should abstain or desist from opposing the discharge of such insolvent ;

“ 7. If he shall be guilty of any fraud whatever, contrary to the true intent of this article.” 2 R. S. 23, § 35 ; 3 R. S. 6th ed. 19, § 40 ; 2 Edm. 24 ; 1 Fay’s Dig. 373.

All other objections to the discharge, except those named in this section, and such as go to the jurisdiction of the officer granting the discharge, must be taken at the hearing, and are available only on *certiorari*. *People v. Stryker*, 24 Barb. 649 ; *Rusher v. Sherman*, 28 Barb. 416.

Under this section the acts which vitiate the discharge, are such as are connected with a fraudulent intent on the part of the debtor. “ All the specific acts,” says Emott, J., in *People v. Stryker* (24 Barb. 649, 652), “ enumerated in section 35, either of which will vitiate the proceedings absolutely, are acts which are necessarily and irresistibly proofs of a fraudulent design ; which are, in short, of themselves, and by their necessary consequences, frauds upon the law itself.”

So it is remarked by Allen, J., in *Small v. Graves* (7 Barb. 576), “ the act which will vitiate the discharge must be an act of the insolvent.” See also *Hall v. Robbins*, 61 Barb. 33 ; s. c. 4 Lans. 463.

A neglect on the part of the assignee, to take the oath pre-

scribed, cannot prejudice the insolvent or affect his discharge. *People v. Stryker*, 24 Barb. 649.

A failure on the part of the creditors, to appear and raise objections on the return day, of the order to show cause, will amount to a waiver of all irregularities in the proceedings, if the officer possesses the requisite jurisdiction, except as to those matters which the statute declares sufficient to avoid the discharge. *People v. Stryker*, 24 Barb. 649; *Rusher v. Sherman*, 28 Id. 416; *Soule v. Chase*, 1 Robt. 222; s. c. 1 Abb. Pr. N. S. 48; *Stanton v. Ellis*, 16 Barb. 319; s. c. 12 N. Y. 575; *Taylor v. Williams*, 20 Johns. 21.

§ 78. *Amendment of proceedings.*—If, on the return of the order to show cause, the creditors appear and object on the ground of a mere irregularity, not going to the jurisdiction of the officer, an amendment may be allowed. Thus the insolvent has been permitted, on the hearing, to amend the schedules by inserting the consideration of debts named therein. *Matter of Hurst*, 7 Wend. 239; *Brodie v. Stephens*, 2 Johns. 289; *Morewood v. Hollister*, 6 N. Y. 309; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450.

“It has been the practice of the judges of this court,” says Daly, First Judge of the Common Pleas (*Matter of Andriot*, 2 Daly, 23, 30), “when proceedings of this kind have been instituted before them individually, and of other judges of this city, upon the authority of *Brodie v. Stevens* (2 Johns. 389), to allow the schedules to be amended, unless (whenever ?) they were satisfied that the omission was unintentional or rose from a misconception of the requirements of the statute.” See *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450; *Matter of Thomas*, Id. 114.

But when the defect or irregularity relates to the jurisdiction of the officer, no amendment can be allowed. Thus, where the affidavit required to be made by the debtor, was not verified before the officer to whom the petition was presented, it was held that the omission could not be cured subsequently at the hearing. *Small v. Wheaton*, 4 E. D. Smith, 306; s. c. 2 Abb. Pr. 175.

§ 79. *Review of proceedings.*—“Whenever any authority shall be exercised by a county court or any officer, pursuant to any provisions of this title, the proceedings may be removed

into the Supreme Court by *certiorari*, and there examined and corrected. But no such *certiorari* shall issue unless allowed by a justice of the Supreme Court; nor shall it operate as a stay of proceedings, unless it shall be so directed in the order of allowance." 2 R. S. 49, § 47; 3 R. S. 6th ed. 43, § 52; Laws of 1823, p. 137, § 4; 1847, ch. 280.

The provisions of the Code of Procedure, in reference to appeals, were declared not to affect proceedings under the chapter of the Revised Statutes, in which the title under consideration occurs. Code, § 471. The act of 1854 (ch. 270), provided that appeals might be taken to the general term of the Supreme Court, or the Superior Court, or Court of Common Pleas, of the city of New York, from any judgment, order, or final determination made at a special term of either of said courts in any special proceeding therein. Under these provisions of law, it was held that a final order made in proceedings under the sixth article (chap. VII, *post*), which are proceedings in court, was appealable to the general term, and from thence to the Court of Appeals. *Matter of Brady*, 69 N. Y. 215; *affi'g s. c.* 15 Supm. Ct. (8 Hun), 437.

But the proceedings under the two-third act are not had in court, but before certain specified officers, and are in this respect like the proceedings under the fifth article (chap. VI, *post*). An order made in these proceedings is not therefore appealable to the general term. It can be reviewed only by *certiorari*. *Matter of Roberts*, 53 How. Pr. 199; *s. c.* 17 Supm. Ct. (10 Hun), 255.

The sections of the act of 1854, in reference to appeals, have been repealed (Laws of 1877, ch. 417), and in their place the Code of Civil Procedure has enacted § 1356, by which it is provided "that an appeal may be taken to a general term of the Supreme Court or of a superior city court, from an order affecting a substantial right made in a special proceeding at a special term or a trial term of the same court, or in the Supreme Court, at a term of a Circuit Court, or made by a judge of the same court, in a special proceeding instituted before him pursuant to a special statutory provision, or instituted before another judge and transferred to or continued before him." The effect of which is to provide for an appeal in special proceedings commenced before a judge or in court. By § 1357 of the Code of

Civil Pro., appeals may also be taken to the Supreme Court, from an order affecting a substantial right made by a court of record possessing original jurisdiction, or a judge, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision.

The right to proceed by *certiorari* cannot be denied, although the party may also have a remedy by appeal. *People ex rel Lewis v. Daly*, 11 N. Y. Supm. (4 Hun), 641.

The application for the writ cannot be made at chambers ; it must be made to the court, either at general or special term. *Gardner v. Commissioners*, 10 How. Pr. 181.

It seems that a person who is not a creditor of the insolvent, and has no right which has been or can be affected by his discharge, has no right to sue out a *certiorari* for the purpose of having the discharge vacated. *People v. Stryker*, 24 Barb. 649.

Under a *certiorari* issued in pursuance of this section, the power of the court is not limited to the questions of the jurisdiction of the officer and the regularity of the proceedings, but it may examine and correct any erroneous decision of the officer upon a question of law. *Morewood v. Hollister*, 6 N. Y. 309 ; *People v. Brooks*, 40 How. Pr. 165.

A review of the decision of the Supreme Court, on the *certiorari*, can be obtained by writ of error to the Court of Appeals.

If the determination be adverse to the debtor upon the merits, and he does not succeed on appeal or *certiorari*, he will be bound by the adjudication and cannot renew the proceedings before another tribunal. The doctrine of *res adjudicata* applies to these proceedings. *Matter of Roberts*, 17 Supm. Ct. (10 Hun), 253 ; *aff'd* 53 How. Pr. 199 ; *Demarest v. Day*, 32 N. Y. 281 ; *People ex rel Lodowick v. Akin*, 4 Hill, 606 ; *White v. Coatsworth*, 6 N. Y. 137 ; *Yonkers & N. Y. Fire Ins. Co. v. Bishop*, 1 Daly, 449 ; *Powers v. Witty*, 42 How. Pr. 352 ; and see *Matter of Rosenberg*, 10 Abb. N. S. 450 ; *Matter of Thomas*, *Id.* 114, and *post*, chap. VII.

Costs may be allowed in these proceedings and on appeals therefrom, in the discretion of the court, and when allowed are at the rate of similar services in civil actions. Laws of 1854, ch. 270, § 3.

PART II.

OF PROCEEDINGS BY AND AGAINST INSOLVENT DEBTORS IMPRISONED OR LIABLE TO ARREST, IN CIVIL ACTIONS.

CHAPTER V.

PROCEEDINGS BY CREDITORS TO COMPEL ASSIGNMENTS BY DEBTORS IMPRISONED ON EXECUTION IN CIVIL CAUSES.

(R. S. Part II, Ch. 5, Title 1, Art. 4.)

§ 80. *In general.*—The provisions of this article to compel assignments by debtors imprisoned on execution in civil causes were incorporated into the Revised Statutes from the act of February 28, 1817, amending the act of April 3, 1813, the substance of which is retained in the proceeding which we have previously examined. It is an adversary proceeding against the insolvent, founded upon the supposition that he is wasting his property (see § 81). *Matter of Bradstreet*, 13 Johns. 385. Any creditor having a demand for twenty-five dollars or upwards against a debtor who has been imprisoned on execution for sixty days, may petition to compel an assignment of his property. An order is then made requiring all the creditors to appear upon the return day. If, at that time, any of the creditors join in a petition for an assignment of the debtor's estate, accompanied by the proper affidavits, the debtor is to be brought before the court, and if after his examination it appears that two-thirds of his creditors residing in the United States have joined in the petition, and no cause appearing to the contrary,

the officer may make an order requiring the debtor to deliver an account of his creditors and inventory of his estate, and to execute an assignment of his property, or show cause why such assignment should not be made by the officer. The proceedings are then conducted in substance as under the two-third act, and if the debtor voluntarily execute an assignment of his estate, he obtains a discharge with like effect as under that act. If he refuses to make the assignment, the officer is authorized to make it, but the debtor in that case can then obtain no discharge in any other manner than upon a petition by himself and two-thirds of his creditors who were such at the date of the order for publication of notice to creditors. The proceedings presented in this chapter are seldom resorted to. Very few cases have been reported construing the provisions of the statute. It constitutes article 4, of title 1, of chapter 5, of part 2, of the Revised Statutes.

§ 81. *What creditors may petition.*—"When any person shall have been actually imprisoned for more than sixty days upon execution in any civil action, any creditor having a demand against such person to the amount of twenty-five dollars, for which a suit might then be brought, may apply by petition to any of the officers enumerated in the first section of the seventh article of this title, to compel an assignment of the estate of such debtor." 2 R. S. 24, § 1; 3 R. S. 6th ed. 20, § 1; 2 Edm. 24; 1 Fay's Dig. 374.

A creditor having the body of his debtor in execution, cannot be a petitioning creditor under the insolvent acts. *Beaty v. Beaty*, 2 Johns. Ch. 430. See *ante*, § 22. The application should be made therefore by some creditor other than the creditor upon whose execution the debtor is imprisoned.

The application must be made to one of the officers mentioned in § 26, *ante*. 2 R. S. 34, § 1; 3 R. S. 6th ed. 28, § 1; 2 Edm. 35; 1 Fay's Dig. 382.

The application must be made to an officer residing in the county in which the insolvent or imprisoned debtor resides or is imprisoned (§ 27, *ante*), and when the officer is incapable of acting, the proceedings may be commenced and continued as prescribed in § 29, *ante*.

§ 82. *Contents of petition.*—"The petition shall state the nature and object of the application, and shall be accompanied by an affidavit of the creditor, stating that such imprisoned debtor is justly indebted to him in a certain sum, therein to be specified, then due; that such debtor is imprisoned in a certain county therein to be named, under an execution against him in some civil action; that he has been so imprisoned for more than sixty days, and that such creditor is apprehensive that the estate of such debtor will be wasted or embezzled." 2 R. S. 24, § 2; 3 R. S. 6th ed. 20, § 2; 2 Edm. 25; 1 Fay's Dig. 374.

§ 83. *Order for creditors to appear.*—"Upon such application being made to such officer, he shall make an order requiring the creditors of such imprisoned debtor to appear before him at a certain time and place to be specified in the order, and determine whether they will unite in a petition for an assignment of such debtor's estate." 2 R. S. 24, § 3; 3 R. S. 6th ed. 20, § 3; 2 Edm. 25; 1 Fay's Dig. 374.

§ 84. *Notice of order.*—"The creditor making such application shall cause notice of such order to be published once in each week, for eight weeks successively, in the State paper and in a newspaper printed in the county where such debtor is imprisoned, if there be any, and if there be none, then in a newspaper printed nearest to the place of such imprisonment." 2 R. S. 24, § 4; 3 R. S. 6th ed. 20, § 4; 2 Edm. 25; 1 Fay's Dig. 375.

§ 85. *Service of copy on debtor.*—"Such creditor shall also, within ten days after the granting of such order, serve a copy thereof on the debtor, or on the keeper of the jail where such debtor is imprisoned, who shall deliver the same to such debtor." 2 R. S. 25, § 5; 3 R. S. 6th ed. 20, § 5; 2 Edm. 25; 1 Fay's Dig. 375.

§ 86. *The hearing.*—"On the day appointed for showing cause, or on such subsequent days and times as the officer making the order shall direct, upon proof being made to him of the

due publication of such notice and of the service of such order, such officer shall proceed to hear the proofs and allegations of the parties." 2 R. S. 25, § 6; 3 R. S. 6th ed. 21, § 6; 2 Edm. 25; 1 Fay's Dig. 375.

§ 87. *Order for examination of debtor.*—"If, at the time of such hearing, any of the creditors of such imprisoned debtor shall unite in a petition for the assignment of such debtor's estate, and shall accompany such petition with the same affidavit of each creditor, as is required in the fourth section of article third of this title (except that such affidavits respectively shall state, that the sums therein specified were due from such debtor, at the time of granting the order for publication of notice to creditors, as hereinbefore required), the officer to whom the same may be presented, may order such imprisoned debtor to be brought before him, to be examined touching his debts." 2 R. S. 25, § 7; 3 R. S. 6th ed. 21, § 7; 2 Edm. 25; 1 Fay's Dig. 375.

The requirements as to affidavits of the petitioning creditors are, with the exception noted in the statute, such as have been previously considered under the two-third act. See § 23, *ante*.

Corporations, non-resident creditors, creditors holding assigned claims and secured creditors may petition as under the two-third act. See §§ 18, 19, 20, 21, and the penalty for false swearing also applies to this proceeding, § 25, *ante*.

§ 88. *Examination of debtor.*—"Upon such debtor being brought before the said officer, he shall be examined on oath concerning his creditors, the sums of money due to them respectively, and the places of their residence." 2 R. S. 25, § 8; 3 R. S. 6th ed. 21, § 8; 2 Edm. 26; 1 Fay's Dig. 375.

The debtor's wife and other witnesses may be examined under the provisions cited in connection with the two-third act. See § 44, *ante*.

§ 89. *Proceeding when debtor refuses to submit to examination.*—"If the debtor refuse to be so examined, or shall not give full information concerning the matters so inquired of him, the officer shall by order in writing commit him to close confine-

ment in the jail of the county in which he shall be imprisoned, in which order the cause of such commitment shall be particularly specified; and such debtor shall thereupon be closely confined, without being entitled to the liberties of the jail, until he shall consent to such examination and give such information." 2 R. S. 25, § 9; 3 R. S. 6th ed. 21, § 9; 2 Edm. 26; 1 Fay's Dig. 375.

§ 90. *Other proof to be taken.*—"Upon any debtor being so committed, the said officer shall proceed to take other proof of the debts owing by such debtor, and the names and residence of his creditors, and of the sums due to them respectively." 2 R. S. 25, § 10; 3 R. S. 6th ed. 21, § 10; 2 Edm. 26; 1 Fay's Dig. 375.

§ 91. *Order for debtor to deliver account and inventory.*—"If it shall appear by the examination of the debtor, or by other proof, satisfactorily to the said officer, that creditors residing within the United States, having debts due to them amounting to two-thirds of all the debts owing by such imprisoned debtor to creditors within the United States, have petitioned in the manner hereinbefore directed for an assignment of such debtor's estate, and no good cause to the contrary appear, the officer shall make an order requiring such debtor, by a certain day to be therein specified, to deliver an account of his creditors and an inventory of his estate to such officer, upon oath, and to execute an assignment of his estate; or that he show cause why such an assignment should not be made by such officer." 2 R. S. 25, § 11; 3 R. S. 6th ed. 21, § 11; 2 Edm. 26; 1 Fay's Dig. 375.

§ 92. *When petition to be dismissed.*—"If it shall not appear that two-thirds of the creditors of such imprisoned debtor as aforesaid have united in the said petition, all further proceedings thereon shall cease, and such petition shall be dismissed." 2 R. S. 26, § 12; 3 R. S. 6th ed. 21, § 12; 2 Edm. 26; 1 Fay's Dig. 375.

§ 93. *Debtor's account, inventory, affidavit, and assignment.*—"Within ten days after service of the order requiring the assignment, such imprisoned debtor shall deliver to the officer making such order an account of all his creditors and an inventory of his estate, with the books, vouchers, and securities relating to the same, in all respects conformable to the account and inventory required of an insolvent debtor in the preceding third article of this title; and shall take and subscribe the oath in that article required of a debtor petitioning for his discharge, and shall execute an assignment of his estate, and produce the evidence thereof, in the same manner and with the like effect as prescribed in that article." 2 R. S. 26, § 13; 3 R. S. 6th ed. 21, § 13; 2 Edm. 26; 1 Fay's Dig. 375.

The proceedings referred to in this section are stated in detail in the previous chapters. See §§ 24, 31, 50, 54, 55.

§ 94. *Demand of jury and proceedings thereon.*—"Any creditor of such imprisoned debtor may, at the time of such debtor's rendering his account and inventory, demand that the case of such debtor be submitted to a jury; and shall be entitled thereto on filing with the officer before whom the proceedings shall be had a specification of the grounds of his objection to such debtor's discharge; and the same proceedings shall be had in all respects for the summoning of such jury, and for their determination of the matter, and with the like effect, as prescribed in said third article." 2 R. S. 26, § 14; 3 R. S. 6th ed. 21, § 14; 2 Edm. 27; 1 Fay's Dig. 375.

The proceedings on a demand for a jury under the third article referred to will be found in chapter III, § 45.

§ 95. *Examination of debtor; Payments and transfers by him; Preferences.*—"Such debtor may be examined in the same manner and with the like effect as is prescribed in the said third article; and may in like manner be required to pay or secure the payment of any debts collected by him, or the value of any property assigned by him, after the first publication of the notice to his creditors to appear, with the same exceptions as in that article are specified; and if it shall appear that he has preferred any creditor, as in the said article specified, he shall in

like manner be precluded from obtaining a discharge under this article." 2 R. S. 26, § 15; 3 R. S. 6th ed. 22, § 15; 2 Edm. 27; 1 Fay's Dig. 376.

The proceedings on examination of the debtor will be found *ante*, § 47. Those in reference to payments and transfers of property made by the debtor, after the publication of notice, at § 48, *ante*. And as to the preference which will bar a discharge, see *ante*, § 49.

§ 96. *Discharge, when granted.*—"If such imprisoned debtor shall in all respects comply with the order of the said officer, and with the provisions of the preceding sections of this article, and if the jury shall determine in favor of such debtor; or in case no jury shall be demanded, or they disagree, if the officer before whom the proceedings shall be had, shall be satisfied of the fairness of the proceedings of such debtor, and that he has made a full disclosure of his property, of the securities relating thereto, and of his creditors, the officer shall grant to such debtor a discharge from his debts and from imprisonment." 2 R. S. 26, § 16; 3 R. S. 6th ed. 22, § 16; 2 Edm. 27; 1 Fay's Dig. 376.

The discharge must be recorded under the provisions previously cited in connection with the two-thirds act. See § 74, *ante*.

§ 97. *Effect of discharge.*—"Every such discharge shall have the like effect in all respects, both in regard to the debts of such debtor and the exonerating of his person from arrest or imprisonment, as if the same had been granted upon the application of such debtor and two-thirds of his creditors, according to the provisions of the third article of this title; and the same may in like manner be impeached, and shall become void in the same cases, so far as they are applicable, in which a discharge granted under the said third article would be void." 2 R. S. 27, § 17; 3 R. S. 6th ed. 22, § 17; 2 Edm. 27; 1 Fay's Dig. 376.

The provisions referred to are to be found in chapter IV.

A debtor imprisoned on proceedings under the act of April 26, 1831, "to abolish imprisonment for debt, &c., cannot be discharged from imprisonment under this proceeding. *People ex rel. La Torre v. O'Brien*, 54 Barb. 38.

§ 98. *Assignment by officer.*—"If such imprisoned debtor shall not comply with the order of the officer requiring an account, inventory and assignment as aforesaid, and with the provisions of this article, and if no sufficient cause be shown by him to the contrary, the said officer, upon proof being made of the service of the said order, and of the neglect of the debtor to comply therewith, shall execute an assignment of all the estate of such debtor to the assignees nominated by the petitioning creditors, for the benefit of all the creditors of the debtor." 2 R. S. 27, § 18; 3 R. S. 6th ed. 22, § 18; 2 Edm. 27; 1 Fay's Dig. 376.

§ 99. *Effect of such assignment.*—"The assignment so executed by such officer, shall be equally valid and have the like effect upon all the real and personal property which such imprisoned debtor had on the first day of the publication of the notice to his creditors hereinbefore required, as if such assignment had been executed by such debtor voluntarily on that day." 2 R. S. 27, § 19; 3 R. S. 6th ed. 23, § 19; 2 Edm. 28; 1 Fay's Dig. 376.

§ 100. *When debtor precluded from obtaining discharge.*—"Every such imprisoned debtor who shall refuse or neglect to render such account and inventory, and to execute such assignment, pursuant to any order made as herein directed, shall thereafter be precluded from obtaining any discharge from his imprisonment, in any other manner than upon a petition by himself and by so many of his creditors, who were such at the date of the order for publication of notice to the creditors, as are required by the preceding sections of this article, to unite in a petition to compel an assignment." 2 R. S. 27, § 20; 3 R. S. 6th ed. 23, § 20; 2 Edm. 28; 1 Fay's Dig. 376.

§ 101. *Proceedings where both debtor and creditors petition.*—"Upon any such imprisoned debtor making an application for his discharge, in conjunction with his creditors, as in the last section specified, the same proceedings in all respects shall be had thereon, as are prescribed in the proceeding third article of this title; except that any assignment which shall be

executed by such debtor pursuant to such application shall be made to the same assignees to whom any assignment of such debtor's estate shall have been made by any officer under the provisions of this article, or to such of them as shall be alive and competent to act; and if there be none, to such assignees as the officer entertaining the proceedings shall appoint." 2 R. S. 27, § 21; 3 R. S. 6th ed. 23, § 21; 2 Edm. 28; 1 Fay's Dig. 376.

§ 102. *What property vests in assignee.*—"Whenever any assignment shall be executed by any officer as herein provided, in consequence of the refusal or neglect of an imprisoned debtor to execute the same, all property, except such as shall be by law exempt from execution, which such debtor shall acquire during his imprisonment and after the first publication of the notice to creditors, shall be deemed to vest in the assignees appointed by such officer, by virtue of the assignment so by him executed." 2 R. S. 28, § 22; 3 R. S. 6th ed. 23, § 22; 2 Edm. 28; 1 Fay's Dig. 377.

CHAPTER VI.

OF VOLUNTARY ASSIGNMENTS BY AN INSOLVENT FOR THE PURPOSE OF EXONERATING HIS PERSON FROM IMPRISONMENT.

(R. S. Part II, Ch. 5, Title 1, Art. 5.)

§ 103. The proceeding considered in this chapter relates to applications to relieve a debtor from liability to imprisonment by reason of any debt arising upon contract, and if in prison by reason of any such debt that he may be discharged from his imprisonment. It constitutes article 5, title 1, chapter 5, part 2, of the Revised Statutes.

A valid discharge granted under the provisions of this article operates so that if a person in whose favor the discharge has been granted should thereafter be sued in an action *ex contractu* for a debt due or contracted at the time of the application for a discharge, and should be arrested on the ground that the debt was fraudulently contracted, such person would be entitled to be discharged from arrest. Jones, J., in *Am. Flask & Cap Co. v. Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333; *Wright v. Ritterman*, 1 Abb. Pr. N. S. 428.

The provisions of this article were not suspended by the passage of the bankrupt law. *Matter of Jacobs*, 12 Abb. Pr. N. S. 273.

§ 104. *Petition of debtor*.—"Every insolvent debtor may present a petition to any of the officers mentioned in the first section of the seventh article of this title, or to any judge of a county court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempted from arrest or imprisonment by reason of any debts arising upon contracts previously made, and if in prison, that he may be discharged from his imprisonment." 2 R. S. 28, § 1; 3 R. S. 6th ed. 23, § 1; 2 Edm. 29; 1 Fay's Dig. 377.

A debtor who has given a preference contrary to the provisions of the statute (see *ante*, § 49), cannot obtain a discharge under this article. Nor can a debtor who is under commitment

under the act to abolish imprisonment for debt obtain a release. *People ex rel. Latorre v. O'Brien*, 3 Abb. Dec. 552; s. c. 6 Abb. Pr. N. S. 63; s. c. 54 Barb. 58; aff'g 5 Abb. Pr. N. S. 223.

The application may be made to any judge or officer mentioned in § 26, *ante*. It must be made to an officer residing in the county in which the insolvent or imprisoned debtor resides or is imprisoned (*ante*, § 27), and the provisions of the sections cited (*ante*, §§ 28, 29) are all applicable to proceedings under this article. *Matter of Roberts*, 53 How. Pr. 199.

§ 105. *Schedule and affidavit*.—"On presenting such petition the insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, similar in all respects to the account and inventory required of an insolvent by the third article of this title; and shall annex to the said petition and schedule the following affidavit, which shall be taken and subscribed by him before the officer to whom such petition is presented, and shall be certified by such officer:

"I, ———, do swear (or affirm, as the case may be), that the account of my creditors, with the places of their residence, and the inventory of my estate, with the evidences of my title thereto, which are herewith delivered, are in all respects just and true; and that I have not at any time or in any manner whatsoever disposed of or made over any part of my estate, for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid to, or in any way compounded with, any of my creditors, with a view that they or any of them should abstain or desist from opposing my discharge.'" 2 R. S. 28, § 2; see Laws of 1819, 115, § 2; 3 R. S. 6th ed. 23, § 2; 2 Edm. 29; 1 Fay's Dig. 377.

As to the form and requisites of the schedule and affidavit, see *ante*, §§ 24, 31.

§ 106. *Order to show cause*.—"Upon receiving such petition, schedule and affidavit, the officer shall make an order requiring the creditors of such insolvent, to show cause before the said officer, at a time and place to be specified in the order, why the prayer of the petitioner should not be granted." 2 R. S. 29, § 3;

Laws of 1819, p. 115, § 2; 3 R. S. 6th ed. 23, § 3; 2 Edm. 29; 1 Fay's Dig. 377.

In the Matter of Jacobs (12 Abb. Pr. N. S. 273), where the order was made returnable before F. L., one of the judges of the Court of Common Pleas, this was held to be a sufficient specification of the place of return, and to be a compliance with the statute. In that case it was also stated that the officer acquired jurisdiction by the presentation of the petition and schedules, and that the order to show cause was an incident of, but not essential to, such jurisdiction. See *ante*, § 29.

In the Matter of Roberts (53 How. Pr. 199), where the order was made returnable before a justice of the Supreme Court, and upon the return day there was no justice in attendance, and on the next court day the proceeding was adjourned by another justice of the Supreme Court, who did not reside in the county, it was held that the justice had no jurisdiction and the proceedings were out of court.

§ 107. *Notice to creditors*.—"Notice of the contents of such order, shall be published for the like time and in the like manner, as directed in article third of this title, respecting notices upon the application of an insolvent in conjunction with two-thirds of his creditors." 2 R. S. 29, § 4; 3 R. S. 6th ed. 24, § 4; 2 Edm. 29; 1 Fay's Dig. 377; see Laws of 1819, p. 115, § 2.

As to the requisites of the notice and manner of publication, see *ante*, §§ 36-39.

§ 108. *The hearing; Jury; Proceedings*.—"Every creditor opposing the discharge of an insolvent under this article, may demand a jury to determine upon the matter; and shall be entitled thereto, on filing with the officer to whom the petition was presented, at or before the first hearing on such petition, a specification in writing of the grounds of his objections." 2 R. S. 29, § 5; 3 R. S. 6th ed. 24, § 5; 2 Edm. 29; 1 Fay's Dig. 377.

"The same proceedings shall be had for the summoning and empaneling a jury who shall hear the proofs and allegations of the parties, and render their verdict, in the same manner and with the like effect, as prescribed in the third article of this

title; and a jury may be discharged in the same case therein specified, and in such case, the officer before whom the proceeding shall be had, shall in like manner decide upon the application." 2 R. S. 29, § 6; Laws of 1819, p. 115, § 2; 3 R. S. 6th ed. 24, § 6; 2 Edm. 30; 1 Fay's Dig. 378.

The provisions referred to are to be found *ante*, § 45.

The proceedings may be adjourned, and witnesses subpoenaed and examined under the provisions cited *ante*, § 44.

§ 109. *Examination of debtor; Property transferred after petition; Preference.*—"The petitioner may be examined before the jury or officer, in the same manner as prescribed in the said third article; and may in like manner be required to pay or secure the payment of any debt collected by him, or the value of any property assigned by him, after the presentation of his petition, excepting such as shall appear to have been necessarily expended in the support of himself and his family; and if it shall appear, that he has preferred any creditors, as in the said article specified, he shall in like manner be precluded from obtaining any discharge, under the provisions of this article." 2 R. S. 29, § 7; 3 R. S. 6th ed. 24, § 7; 2 Edm. 30; 1 Fay's Dig. 378.

The provisions referred to are to be found *ante*, §§ 47, 48, 49.

§ 110. *Assignment, when and how executed.*—"If the jury shall find in favor of the petitioner; or in case of their disagreement, or if no jury being required, if the officer before whom the hearing is had, shall be satisfied that such petitioner is unable to pay his debts, that his account and inventory presented with his petition, are true, that he has not been guilty of any fraud or concealment in violation of the provisions of this article, but has in all things conformed thereto; in either case, such officer shall direct an assignment to be made to such assignee or assignees, as such officer shall appoint, of all the estate of such debtor, excepting such articles, as are by law exempt from execution." 2 R. S. 29, § 8; Laws of 1819, p. 116, § 2; 3 R. S. 6th ed. 24, § 8; 2 Edm. 30; 1 Fay's Dig. 378.

“The insolvent shall execute an assignment, with the like effect as declared in the third article of this title, respecting the assignment of a debtor petitioning in conjunction with two-thirds of his creditors, and shall cause the same to be recorded in the same manner.” 2 R. S. 30, § 9; Laws of 1819, p. 118, § 2; 3 R. S. 6th ed. 24, § 9; 2 Edm. 30; 1 Fay’s Dig. 378.

As to the form and effect of the assignment, see *ante*, §§ 50–54, and as to the recording of the assignment, see *ante*, § 74.

§ 111. *The discharge.*—“Upon producing and proving a certificate of the assignees and of the county clerk, as prescribed in the said third article, of the execution and recording of such assignment, and of the delivery of the property assigned, or so much as shall be capable of delivery, with the books and papers relating to the same, the officer before whom the proceedings were had, shall grant a discharge under his hand and seal; declaring, and such shall be its effect, that the person of such insolvent shall forever thereafter be exempted from imprisonment, by reason of any debt due at the time of his making such assignment, or contracted for before that time, though payable afterwards; and by reason of any liabilities incurred by him, by making or indorsing any promissory note or bill of exchange; or incurred by him in consequence of the payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior, or subsequent, to the execution of his assignment.” 2 R. S. 30, § 10; Laws of 1819, p. 118, § 11; 3 R. S. 6th ed. 24, § 10; 2 Edm. 30; 1 Fay’s Dig. 378.

As to the certificate of the assignees, see *ante*, § 54 *et seq.*

The discharge of a debtor under this article applies only to claims arising on contract. *Grocers’ Nat. Bank v. Clark*, 31 How. Pr. 115. Thus an insolvent is not entitled to a discharge from an indebtedness which arose from his embezzlement of money, and evidences of debt which came into his possession as a clerk, in the course of his employment. *Matter of Pie*, 10 Abb. Pr. 409. But a creditor may waive the claim for tort, and then it seems the insolvent will be discharge. *Matter of Pie, supra*. To ascertain whether the creditor’s claim is one in tort or on a contract, the whole of the complaint must be con-

sidered, and not particular words which may be contained in it. *Grocers' Nat. Bank v. Clark*, *supra*; *Harrison v. Lourie*, 49 How. Pr. 124.

But after a claim for tort has been reduced to judgment, it becomes a *quasi* contract, and the debtor may be exonerated from arrest on such judgments. *People v. Marine Court*, 3 Cow. 366; *Ex parte Thayer*, 4 Cow. 66; *Hayden v. Palmer*, 24 Wend. 364; *Luther v. Deyo*, 19 Id. 629.

When a defendant has been discharged under this article, the plaintiff cannot, by discontinuing the action and bringing a new action based on the same state of facts, but sounding in tort and not in contract, procure a second arrest of the defendant. *People ex rel. Ritterman v. Kelly*, 1 Abb. Pr. N. S. 432. And a defendant so arrested will be discharged on *habeas corpus*. *Ibid*; see *Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372.

§ 112. *Defendant to be released from custody*.—"If such insolvent be in prison, in any suit or proceeding, founded upon any contract or liability, as to which he is exempted from imprisonment according to the last section, he shall be discharged therefrom, on producing his discharge granted pursuant to the provisions of this article, and upon indorsing his appearance on any *mesne* process upon which he may be imprisoned." Laws of 1819, p. 116, § 3; 2 R. S. 30, § 11; 3 R. S. 6th ed. 25, § 11; 2 Edm. 31; 1 Fay's Dig. 378.

The words of this section, "in prison," are not to be understood as confining the operation of the section to such prisoners as are in close custody only. In *Hayden v. Palmer* (24 Wend. 364), a person on the limits obtained a discharge under this article and went without the limits. The discharge was held a bar to the limit bond. See Bosworth, J., in *Coman v. Storm*, 26 How. Pr. 84, 88.

Where the debtor is subsequently arrested on *mesne* process, in a suit on a debt or liability in which he is exempted from imprisonment, he may apply for a discharge from arrest under the provisions cited and commented on *ante*, § 73.

§ 113. *Debts not discharged*.—"No debt, demand, judgment or decree, against any insolvent discharged under this

article, shall be affected or impaired by such discharge, but shall remain valid and effectual against all the property of such insolvent, acquired after the execution of his assignment; and the lien acquired by any judgment or decree, upon any property of such insolvent shall not be in any manner, affected by such discharge." 2 R. S. 30, § 12; Laws of 1819, p. 117, § 6; 3 R. S. 6th ed. 25, § 12; 2 Edm. 30, 31; 1 Fay's Dig. 378.

§ 114. *Discharge, when void.*—"Every discharge granted to an insolvent under this article, shall be void in the same cases, so far as they are applicable, in which a discharge granted under the third article of this title is therein declared to be void." 2 R. S. 30, § 13; Laws of 1819, p. 117, § 5; 3 R. S. 6th ed. 25, § 13; 2 Edm. 31; 1 Fay's Dig. 378; see *ante*, § 77.

The review of these proceedings is by *certiorari* under the section cited, *ante*, § 79.

CHAPTER VII.

OF VOLUNTARY PROCEEDINGS BY A DEBTOR IMPRISONED IN EXECUTION IN CIVIL CAUSES.

(R. S. Part II, Ch. 5, Title 1, Art. 6.)

§ 115. *In general.*—The proceedings discussed in the present chapter are intended to enable debtors imprisoned on execution in civil actions to obtain a discharge from imprisonment, upon making a full surrender of their property for the benefit of creditors upon whose judgments and executions they are imprisoned. The sections of the Revised Statutes referred to are to be found in article six, of title one, of chapter five, of part two. They are derived in a measure from the provisions of the act of April 9, 1813, entitled, “An Act for the relief of debtors with respect to the imprisonment of their persons.” 1 R. S. 343. See *ante*, § 4.

§ 116. *Who may apply for a discharge.*—“Every person, who shall be imprisoned by virtue of one or more executions in civil causes, upon which there shall be due a sum not exceeding five hundred dollars, may at any time petition the court from which such process issued, or the county court of the county in which he is imprisoned, for his discharge from such imprisonment, on his compliance with the provisions of this title.” 2 R. S. 31, § 1; 3 R. S. 6th ed. 25, § 1; 2 Edm. 31; 1 Fay’s Dig. 379.

“Every person so imprisoned for a sum exceeding five hundred dollars may, in like manner, petition for his discharge after he shall have been imprisoned for three months.” 2 R. S. 31, § 2; 3 R. S. 6th ed. 25, § 2; 2 Edm. 32; 1 Fay’s Dig. 379.

The application for a discharge under this article must be made to the court. A judge at chambers has no authority to grant a discharge in such a proceeding. *Mather’s Case*, 14 Abb. Pr. 45; *Matter of Walker*, 2 Duer, 655. And the application should be made at a special, and not at a general term. *Matter of Walker*, *supra*.

The county court has jurisdiction of the subject-matter of this article. *Bullymore v. Cooper*, 46 N. Y. 236, 241; *Hart v. Dubois*, 20 Wend. 236; Laws of 1847, ch. 280, p. 369, § 29.

The Court of Oyer and Terminer has power to deliver the jails, according to law, of all the prisoners therein; but this refers only to cases of crimes. That court has no power upon *habeas corpus* to order the discharge of a prisoner held upon execution in a civil action. *People v. Brennan*, 61 Barb. 540.

The statute is very beneficial in its provisions and very general in its terms. It includes "every person." An infant, therefore, who is imprisoned on an execution is entitled to the benefits of the act, notwithstanding his nonage. *People ex rel. Smith v. Mullen*, 25 Wend. 698. And, for a similar reason, it has been held that interest on the judgment will not be added, so as to enhance the amount above the sum named in the statute, and so impede the discharge. *Ex parte Caskaden*, 1 Cai. 346 (this decision was under the act of 1789).

A person charged in execution in a civil cause, whether in close custody or on the limits, whilst held in custody by virtue of such execution, is entitled to apply for his discharge. *Coman v. Storm*, 26 How. Pr. 84; s. c. 1 Robt. 705 (Supr. Ct. Gen. Term), disapproving *Bylandt v. Comstock*, 25 How. Pr. 429; s. c. as *Comstock's Case*, 16 Abb. Pr. 233 (Supr. Ct. Sp. Term). Jails are to be considered as enlarged from the four walls of the ancient law to the assigned limits, and so long as the prisoner is within those limits, so long he is to be considered, in judgment of law, as in prison. *Holmes v. Lansing*, 3 Johns. Cas. 73, 75, 76; *Peters v. Henry*, 6 Johns. 121, 124.

When the defendant is charged on an execution for less than \$500, he is entitled to a discharge at once, upon giving fourteen days notice. But when the execution is for more than \$500, the defendant must have been charged in execution for three months. It is not enough that his imprisonment under the execution and order of arrest has continued for three months. *Dusart v. Delacroix*, 1 Abb. Pr. N. S. 409, note. And where the papers on which the discharge is granted show that the judgment on which the debtor was taken in execution exceeded

\$500, but fail to show that he has been imprisoned for three months, the discharge is void. *Broume v. Bradley*, 5 Abb. Pr. 141; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450.

It is immaterial whether the judgment upon which the execution is issued, under which the prisoner is held, was obtained in an action for tort or upon contract. In either case the debtor will be entitled to his discharge, upon compliance with the statute, if it be found that his proceedings are "just and fair." See *post*, § 120. *The People v. The Marine Court*, 3 Cow. 366; *Ex parte Thayer*, 4 Cow. 66; *Hayden v. Palmer*, 24 Wend. 364; *Luther v. Deyo*, 19 Id. 629; *Grocers' Nat. Bk. v. Clark*, 31 How. 115, 127.

A person committed by precept for contempt in not paying moneys ordered to be paid for temporary alimony, is a person imprisoned by virtue of an execution in a civil cause within the meaning of this section, and may apply for a discharge. *Van Wezel v. Van Wezel*, 3 Paige, 38; *People v. Cowles*, 4 Keyes, 38; s. c. 3 Abb. Dec. 507. See *People v. Campbell*, 40 N. Y. 133. See *Lackmeyer v. Lackmeyer*, U. S. Dist. Ct. South. Dist. of N. Y. Choate, J., MSS. Sept. 1878.

But the statute does not extend to the case of commitment for a fine imposed upon a party for a contempt of court; or where the party is imprisoned for the non-performance of some act or duty which it is in the power of the defendant to perform. *Van Wezel v. Van Wezel*, *supra*. See *Spaulding v. The People*, 7 Hill, 301; *aff'd* 10 Paige, 301.

And where a person is in charge of the sheriff, under an attachment to bring him into court to answer interrogatories in a proceeding for a contempt, an order discharging the person from imprisonment cannot operate to discharge the person. Such a discharge is premature until after conviction. *Jackson v. Smith*, 5 Johns. 115; *Bissell v. Kip*, 5 Johns. 89.

Whether a person imprisoned for costs of a proceeding as for a contempt to enforce a civil remedy is entitled to a discharge was questioned in *Patrick v. Warner* (4 Paige, 397), by Walworth, Chan. See Laws of 1847, ch. 390.

§ 117. *Notice, how served.*—"Fourteen days' previous notice of the time and place at which such petition will be pre-

sented, together with a copy of such petition and the account of his estate hereinafter directed, shall be personally served by such debtor, on the creditors at whose suit he shall be imprisoned, their personal representatives, or their attorney." 2 R. S. 31, § 3; 3 R. S. 6th ed. 25, § 3; 2 Edm. 32; 1 Fay's Dig. 379.

The notice required by this article is entirely different from that required by the previous articles. In the former articles notice was required to be given to all the creditors; here the proceeding is wholly between the debtor and the execution creditors. Service of the notice on the attorney when the plaintiff resided out of the State was sufficient, before the statute. *Bates v. Williams*, 1 Johns. Cas. 30. And, since the notice is entirely for the plaintiff's benefit, he may waive it, or take short notice, by consent. *Hart v. Dubois*, 20 Wend. 237.

§ 118. *The petition and account.*—"Such petition shall set forth the cause of the imprisonment of the applicant, and shall have annexed to it, a just and true account of all his estate real and personal, in law and equity, and of all charges affecting the same, both as such estate and charges existed at the time of his imprisonment, and as they exist at the time of preparing such petition; together with a just and true account of all deeds, securities, books and writings whatsoever relating to the said estate and the charges thereon, with the names and places of abode, of the witnesses to such deeds, securities, and writings." 2 R. S. 31, § 4; 3 R. S. 6th ed. 25, § 4; 2 Edm. 32; 1 Fay's Dig. 379. See 1 R. L. 349, § 4.

The form of the petition is not prescribed by the statute, except as above stated, but sufficient should appear on the face of it to give the court jurisdiction. It should set forth: (1) The fact of the imprisonment of the petitioner, and the amount due upon the execution or executions for which he is held, and if the amount exceeds the sum of \$500, that he has been imprisoned for three months. *Browne v. Bradley*, 5 Abb. Pr. 141; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450. (2) The cause of the imprisonment. (3) A just and true account of his estate, both as it existed at the time of the imprisonment and at the

time of preparing the petition. (4) A just and true account of all deeds, securities, books, and writings whatsoever, relating to the said estate, and the charges thereon, with the names and places of abode of the witnesses to such deeds, securities, and writings. For defective form of petition and order, see *Bullymore v. Cooper*, 46 N. Y. 236.

The statute is imperative, and the papers presented to the court must conform with exactness to its provisions. It is matter necessary to the jurisdiction of the court, not only that a petition and account should be presented to it, but that they shall be the very petition and account specified. *Bullymore v. Cooper*, 46 N. Y. 236, 246, Folger, J.; *People v. Bancker*, 5 N. Y. 106.

It is a requisite to jurisdiction that the petition should contain an account as required by the statute. *Matter of Bullymore*, 46 N. Y. 236; aff'g 2 Lans. 71; *People v. Bancker*, 5 N. Y. 106; *People v. Brooks*, 40 How. 165. The statute requires that the petition shall contain an account of the debtor's estate, both as it existed at the time of the imprisonment and at the time of preparing the petition. The reason for this duplicate account is given by Mullen, J., in *People v. Bancker* (5 N. Y. 106, 123 and note). Its object is to prevent payments and transfers of property to other creditors than the execution creditor during the period of imprisonment, when the debtor would be likely to make terms with his more lenient creditors who had not proceeded to extremes with him, and then demand his liberty from the others on tendering the remaining fragments of his property.

The fact that the debtor has filed a voluntary petition in bankruptcy, and that the assignee in bankruptcy has become clothed with the estate which he had at the time of the imprisonment, does not avoid the requirements of the statute that the petition must contain a just and true account of his estate as it existed at the time of his imprisonment. *Bullymore v. Cooper*, 46 N. Y. 236; *People v. Brooks*, 40 How. Pr. 165. A mere statement in the petition of the proceedings in bankruptcy is not enough. *Bullymore v. Cooper*, *supra*.

No account of creditors is required by this article, for the reason, as we have seen, that no creditors are intrusted in the

proceeding except such as have the debtor on execution. See *Hall v. Kellogg*, 12 N. Y. 325, 333.

§ 119. *Petitioner's affidavit*.—"At the time of presenting such petition, the following affidavit shall be indorsed thereon, and shall be sworn to by the applicant:

"I, the within-named petitioner, do swear [or affirm, as the case may be], that the within petition and account of my estate, and of the charges thereon, are in all respects just and true; and that I have not at any time or in my manner disposed of or made over, any part of any property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors.'" 2 R. S. 32, § 5; 3 R. S. 6th ed. 26, § 5; 2 Edm. 32; 1 Fay's Dig. 379.

The affidavit is a prerequisite to jurisdiction of the case. *Bullymore v. Cooper*, 46 N. Y. 236, 244; *Browne v. Bradley*, 5 Abb. Pr. 141. The statute requires that at the time of presenting the petition the affidavit shall be indorsed thereon and sworn to by the applicant. There is no method, however, provided by which the applicant, if in close custody, can be brought before the court to make the affidavit at the time of presenting the petition. In the case of *Hillyer v. Rosenberg* (11 Abb. Pr. N. S. 402), this difficulty was obviated by construing the time of presenting the petition as extending over until the actual production of the prisoner under the following section. This case cannot be reconciled with the language used in the decision of *Bullymore v. Cooper* (46 N. Y. 236, 244), where it is said, "This [the making of the affidavit] cannot be dispensed with or postponed, and the court have power to proceed. At no time after the presentation of the petition can the affidavit be indorsed and sworn to, and the demand of the statute be answered." In that case, as well as in the case of *Browne v. Bradley* (5 Abb. Pr. 141), the affidavit was sworn to *before* the presentation of the petition, and the decision was placed upon other grounds. The difficulty suggested in the case of *Hillyer v. Rosenberg*, *supra*, was not brought to the attention of the court. It may be that the statute could be fully complied with by obtaining the order mentioned in section 6, after service of the petition and notice, and before the return day, so that the

applicant might be brought before the court upon the day specified in the notice, and then upon presentation of the petition he could make the required affidavit. There appears to be no objection to such a construction of the statute, unless the word "such" in the following section necessarily means a verified petition. See *Bullymore v. Cooper*, 46 N. Y. 236, 244, 245.

§ 120. *Proceedings*.—"Upon presenting such petition, and due proof being made of the service of a copy thereof, and of the account thereto annexed, with the notice hereinbefore required, the court shall order the applicant to be brought before it, on a day to be assigned; and on such day, and such other days as the court shall appoint during the same term, shall proceed in a summary way to hear and determine the proofs and allegations of the parties, and may examine the applicant or his wife, or any other person, on oath; and if satisfied that the petition and account of the applicant are correct, and that his proceedings are just and fair, shall order an assignment to be made of all his property (except the articles which are by law exempt from execution), or of so much thereof as shall be sufficient to discharge the executions on which he shall be imprisoned." 2 R. S. 32, § 6; 3 R. S. 26, § 6; 2 Edm. 32; 1 Fay's Dig. 379.

§ 121. *Proceedings when "just and fair."*—The discharge of the debtor will be denied if it be shown that he has been guilty of any of the acts which he is required to negative by the affidavit prescribed by the preceding section.

"It is enough," says Davis, P. J., in *Matter of Brady* (15 Supm. Ct. [8 Hun], 437; aff'd 69 N. Y. 215), "to show that the proceedings on the part of the prisoner were not "just and fair," if the creditor establishes upon the hearing that the debtor has disposed of or made over any part of his property with intent to injure or defraud any of his creditors, although such act was committed before the commencement of the action in which he is imprisoned, provided they are shown also to be so far connected with the action as to be the grounds upon which the order for his imprisonment therein was based." Accordingly, in a case where the court below had granted a discharge on the ground that it did not appear that at the time of making the

application for a discharge, the debtor was concealing or attempting to conceal property, it was held that this construction of the statute was too narrow, and that evidence produced before the court, showing that the debtor had made certain fraudulent dispositions of his property upon which an arrest had been ordered in the action upon which he was then held in execution should have been considered. *Matter of Brady, supra.*

The case of *Gaul v. Clark* (1 Weekly Dig. 209), goes even further, for in that case a discharge was refused on the ground of a fraudulent mortgage of property made before the commencement of the action, but in view of its commencement, although in no way connected with the subject-matter of the action. In the *Matter of Watson* (2 E. D. Smith, 429), where it was urged that the proceedings referred to are the proceedings in the application, and not transactions at any time prior to imprisonment under the execution, the general term of the common pleas refused to sustain the position.

A different conclusion, however, was reached by Mr. Justice E. Darwin Smith, in the *People v. White*, 14 How. Pr. 498. He says (p. 303): "But if the court is satisfied that the applicant has concealed nothing in respect to his property or its condition, and honestly and truly proposes to purchase his freedom from imprisonment by a complete surrender of all his property rights and interests to his creditors, it is the duty of the court to discharge him, however dishonest or improper his conduct may have previously been in other respects, or in other connections and at other times." In that case, the defendant, a public defaulter for a large amount, professed to be unable to give any account of what had become of the money, and failed to explain in a satisfactory manner, certain transfers of property in which he appeared to have a large equitable interest, and the inventory contained but a trifling amount of property, the court held that his proceedings were obviously not "just and fair." See also, *Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372; *Matter of Andriot*, 2 Daly, 24.

In the case of *People v. Brooks* (40 How. Pr. 165), where the debtor, after imprisonment, filed a voluntary petition in bankruptcy, and by virtue thereof, assigned all his property to an

assignee in bankruptcy and then filed his petition for a discharge, it was held that such a disposition of his property was a fraud upon the act, and was a ground for refusing a discharge. See *Spear v. Wardwell*, 1 N. Y. 144; *Hall v. Kellogg*, 12 N. Y. 325. But in *Roswog v. Seymour* (7 Robt. 427), where the petition in bankruptcy was filed before the debtor was charged in execution, it was held to be a valid disposition of his property, and no bar to the debtor's discharge under this title. See *Corning v. White*, 2 Paige, 567.

Where a discharge is refused because the proceedings are adjudged to be not "just and fair," the right of the debtor to a discharge under the petition is *res adjudicata*. It may be reviewed by the appellate court, but if not disturbed, it is conclusive upon the petitioner. He cannot commence a new proceeding involving the same facts and have the same issues re-tried. *Matter of Thomas*, 10 Abb. Pr. N. S. 114.

The only course left open to the debtor in such a case is to make a motion to open the proceedings, and for leave to amend. *Matter of Thomas*, *supra*; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450.

§ 122. *Adjournment*.—"Upon sufficient cause shown by any creditor, the court may adjourn the hearing of such petition to the next term thereof, but no adjournment shall be made extending beyond the next term." 2 R. S. 32, § 7; 3 R. S. 6th ed. 26, § 7; 2 Edm. 32; 1 Fay's Dig. 380.

"At such adjourned hearing no objections to matters of form shall be received, and unless the opposing creditor shall then be able to satisfy the court that the proceedings on the part of the prisoner are not just and fair, the court shall order an assignment as aforesaid, and grant a discharge as hereinafter directed." 2 R. S. 32, § 8; 3 R. S. 6th ed. 26, § 8; 2 Edm. 33; 1 Fay's Dig. 380.

When the defendant failed to appear upon the adjourned day, and the proceedings were dismissed with leave to come in on terms, and a motion was made to open the default, it was held that the failure to have a day assigned at the adjourned day, discontinued the proceedings and the court ceased to have jurisdiction. *Bylandt v. Comstock*, 25 How. Pr. 429.

So, when the proceedings were not adjourned to the next term, the adjournment of the court without day put an end to them. *People v. Brooks*, 40 How. Pr. 165.

§ 123. *The assignees and assignment.*—"The court shall appoint one or more assignees, and the assignment shall be made to the persons so appointed, by an indorsement on such petition, which shall vest in the assignees all the estate, right, and interest of the applicant in all the property, real and personal, so directed to be assigned for the benefit of the creditors upon whose execution he is imprisoned." 2 R. S. 32, § 9; 3 R. S. 6th ed. 26, § 9; 2 Edm. 33; 1 Fay's Dig. 380.

"Such applicant shall furnish satisfactory evidence to the court, of the actual delivery to the assignees so appointed, of all the property so directed to be assigned, or he shall give such security for the future delivery thereof, as the court shall approve." 2 R. S. 32, § 10; 3 R. S. 6th ed. 26, § 10; 2 Edm. 33; 1 Fay's Dig. 380.

The design of this section is to leave it to the sound discretion of the court whether to require any security, and if any then to fix the form of the security, and the amount, according to the circumstances of each particular case. *Roswog v. Seymour*, 7 Robt. 429.

§ 124. *The discharge.*—"Upon such assignment being made, and such evidence or security being furnished, the court shall order the discharge of the applicant from his imprisonment, by virtue of any execution which shall have been specified in his petition, and the sheriff shall discharge him accordingly, on being served with such order, without any detention on account of any fees." 2 R. S. 32, § 11; 3 R. S. 6th ed. 26, § 11; 2 Edm. 33; 1 Fay's Dig. 380.

No recitals are necessary to the validity of the order. It is valid if the facts exist which make it so, notwithstanding they are not recited in it. But that the order of itself should constitute a protection to the sheriff in discharging the prisoner, and that it should be *prima facie* evidence of the regularity of the proceedings upon which the discharge is granted, it should contain recitals of the facts, giving general and special jurisdiction.

§§ 125–127.] ASSIGNEES, THEIR RIGHTS AND DUTIES.

Bullymore v. Cooper, 46 N. Y. 236; affi'g 2 Lans. 71. If the order is relied upon without proof *aliunde* of the facts needful to jurisdiction, there must be in it ample allegations thereof. *Bullymore v. Cooper*, *supra*; see *Bennett v. Burch*, 1 Denio, 141. See *ante*, p. 74.

§ 125. *The debtor still liable for the debt.*—"Notwithstanding such discharge, the party in whose favor any execution shall have been issued, shall be entitled to the same remedies against such applicant, by execution against his property only, or by suit on the judgment upon which such execution was issued, for any balance that may be due thereon, as he might have had if such execution had not been issued, but the applicant shall not be held to bail in any such suit, nor shall execution issue against his person on any judgment obtained thereon." 2 R. S. 33, § 12; 3 R. S. 6th ed. 26, § 12; 2 Edm. 33; 1 Fay's Dig. 380.

§ 126. *Debtor, when liable to re-arrest.*—"If the applicant shall be convicted of perjury in any of the proceedings authorized by this article, the party at whose suit he was imprisoned, may issue execution against the body of such applicant." 2 R. S. 33, § 13; 3 R. S. 6th ed. 27, § 13; 2 Edm. 33; 1 Fay's Dig. 380.

§ 127. *The assignees, their rights and duties.*—"The assignee shall be vested with all the rights in, and powers over, the property so assigned which are specified in the eighth article of this title, and shall be subject to the same duties, obligations, and control, in all respects, except as herein otherwise provided." 2 R. S. 33, § 14; 3 R. S. 6th ed. 27, § 14; 2 Edm. 33; 1 Fay's Dig. 380.

"It shall not be necessary for such assignees to publish any notice, calling a general meeting of creditors, but they shall proceed to collect, sell and distribute the proceeds of the property assigned to them, as follows:

"1. They shall pay the jail fees, on the imprisonment and discharge of such applicant.

"2. They shall distribute the net produce of the property

that shall come to their hands, among the creditors who charged such applicant in execution, previous to the exhibition of his petition, in proportion to the amounts due on their respective executions, and for that purpose shall give personal notice to such creditors or their attorneys, of the time and place of making a dividend, instead of publishing such notice.

“3. They shall pay over to such applicant or his personal representatives, the surplus which may remain after discharging such executions, and defraying their expenses.” 2 R. S. 33, § 15; 3 R. S. 6th ed. 27, § 15; 2 Edm. 34; 1 Fay’s Dig. 380.

§ 128. *Debtor may be required to apply for discharge.*—“When any person shall have remained charged in execution for the space of three months, after being entitled to make an application for his discharge according to the provisions of this article, without having made such application, and without having applied for a discharge under the third or fifth articles of this title, any creditor, at whose suit he shall have so remained charged, and his personal representatives may, by notice in writing subscribed by him or them, require such prisoner to to make application for his discharge according to the provisions of this article.” 2 R. S. 33, § 16; 3 R. S. 6th ed. 27, § 16; 2 Edm. 34; 1 Fay’s Dig. 380.

§ 129. *Effect of omission to apply.*—“If within thirty days after personal service of such notice, such prisoner shall not present a petition to a proper officer, either under the third or fifth articles of this title, or shall not serve upon the creditor giving such notice, or his attorney, a copy of a petition and of an account of his estate, with notice of his intention to apply for his discharge according to the provisions of this article, or if, after presenting such petition under the said third and fifth articles, or serving a copy of a petition under this article, such prisoner shall not diligently proceed thereon to a decision, he shall be forever barred from obtaining his discharge from any execution in which he shall be so imprisoned under the provisions of this article, or of the said third and fifth articles.” 2 R. S. 34, § 17, as amended Laws of 1857, ch. 427. The remainder

of the section repealed by Laws of 1877, ch. 417. 3 R. S. 6th ed. 27, § 17; 2 Edm. 34; 1 Fay's Dig. 381. The portion of the statute repealed is supplied by § 1494 of the Code of Civ. Pro.

PART III.

GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

CHAPTER VIII.

DEFINED AND DISTINGUISHED—THE ASSIGNMENT LAWS.

§ 130. *In general.*—The instruments which we are about to consider differ from the assignments referred to in the various statutory proceedings heretofore considered. They are not the creature of the statute. They come into being not by operation of law, or by force of any previous proceedings either by or against the debtor. They are purely the voluntary act of the debtor. They are contracts, and rest, like all contracts, upon the consent of parties. It is true that the manner of executing such instruments is now regulated by statute in this State, and to a certain extent a method for administering the trust created by them, apart from the ordinary processes of a court of equity, has been created; but the right to make an assignment for creditors is derived in no sense from the statute, nor does the statute restrict or limit the operation or effect of such instruments when made. The statute “recognizes the existence of the power in the citizen to make an assignment of his property to trustees for the benefit of his creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse.” *Thrasher v. Bentley*, 1 Abb. N. C. 39, 44, Folger, J. Its object and purpose was to render more efficient and certain the execution of the design for which the common law permitted such assignments to be made. *People v. Chalmers*, 8 Supm. Ct. (1 Hun), 683, 686, Daniels, J.; *aff’d* 60 N. Y. 154.

An assignment for the benefit of creditors is a transfer by a debtor of the whole or a part of his property to some person, in trust to pay his creditors. The essential elements of such instruments are : (1) a conveyance of the debtor's property, (2) in trust, (3) to sell the assigned property, and (4) to distribute the proceeds among the creditors. The instrument is, therefore, simply a deed of trust, and differs from other deeds of the same general character in the peculiarities of the trust created. These peculiarities are as stated.

There must be an actual transfer of the title to the property. A mere power of attorney to collect debts, and apply the proceeds to the payment of the claims of creditors does not amount to an assignment for the benefit of creditors. *Beans v. Bullitt*, 57 Penn. St. 221; *Henderson's Appeal*, 31 Id. 502; *Griffin v. Rogers*, 38 Id. 382; *Banning v. Sibley*, 3 Minn. 389.

There must be a trust and a trustee and creditors, *cestuis que trust*, who can compel an enforcement of the trust. *Dickson v. Rawson*, 5 Ohio St. 218; *Lucas v. The Sunbury & Erie R. R. Co.* 32 Penn. St. 458.

The trust must be to convert the estate into money. This is the only trust in real estate for the benefit of creditors authorized by law. 1 R. S. 728, § 55. A power to sell and convey is necessarily implied by a conveyance of property to pay debts. *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Williams v. Otey*, 8 Humph. (Tenn.) 563.

The trustee must be authorized to distribute. *Hooper v. Tuckerman*, 3 Sandf. 316.

§ 131. *Distinguished from mortgages.*—The instruments to which general assignments for the benefit of creditors bear the closest analogy are mortgages and deeds of trust in the nature of mortgages. The distinction, however, is one clearly defined. A mortgage or deed of trust in the nature of a mortgage is a security for debt. An assignment is more than that. It is an absolute appropriation of property to the payment of debts. *Murray v. Judson*, 9 N. Y. 73, 83, Gardiner, J.; *Hoffman v. Mackall*, 5 Ohio St. 124.

A mortgage creates a lien upon property in favor of the creditor, leaving the equity of redemption still the property of

the debtor, and liable to sale or incumbrance by him. *Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131; *McClelland v. Remsen*, 3 Abb. Dec. 74; *Van Buskirk v. Warren*, 4 Id. 457; *Loeschigk v. Baldwin*, 1 Robt. 377.

An assignment conveys the entire estate, legal and equitable, to the assignee; and the assignor has no rights, legal or equitable in the assigned property until the purposes of the trust are satisfied. *Briggs v. Davis*, 20 N. Y. 9; s. c. 21 N. Y. 574.

There is a distinction between an assignment by a debtor of his property to trustees, upon trust for the payment of particular and specific debts, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the assignor. The latter is in effect a mortgage, and when the debt for which it is security is paid, the property reverts to the original owner. *McClelland v. Remsen*, 36 Barb. 622; s. c. 14 Abb. Pr. 331.

And where a debtor assigns, in good faith, part of his property to creditors *themselves*, for the purpose of securing particular demands, reserving the surplus to himself, the assignment is not void as creating a trust for the debtor under 2 R. S. 135, § 1. The conveyance, whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object or one of the objects of the assignment.

The residuary interest may still be reached by the creditors, who are therefore not delayed or hindered. *Leitch v. Hollister*, 4 N. Y. 211.

"The distinction in such cases," says Welles, J., in *Dunham v. Whitehead* (21 N. Y. 131), "is between a conveyance in trust, in the strict and proper sense of the term, where the trustee acquires the entire title to the subject-matter of the trust, and where the trust can only be enforced or controlled in equity, and a case where a creditor can at once proceed and sell the residuary interest or equity of redemption of the assignor, if the thing assigned be property which may be sold on execution, or if not, where he may reach that interest by a bill or action in

equity in the nature of a creditor's bill—the same as if it never had been assigned—subject only to the lien created by the assignment.”

Deeds of trust in the nature of mortgage with power of sale are also clearly distinguished from general assignments, as known in this State. The radical distinction arises out of the equitable interest which the debtor retains in the property conveyed. See *Hendrickson v. Robinson*, 2 Johns. Ch. 283.

§ 132. *Assignments directly to creditors.*—General assignments are distinguished from conveyances directly to creditors, in the form of a sale of the property to a creditor in payment of his debt, as well as by pledge or hypothecation of the property to a particular creditor, as a security for a debt in the nature of a mortgage, as in the cases just referred to.

A conveyance may be made by a debtor of his property to all his creditors, in trust to distribute the proceeds among them, and with power to name an assignee. *Thompkins v. Wheeler*, 16 Pet. 106; *Cunningham v. Freeborn*, 11 Wend. 240, 256; *Nurse v. Noyes*, 26 Vt. 3. But such conveyances are rarely, if ever made. So a transfer made by a debtor to one creditor, to deduct his own claim and pay the balance to another creditor, may be in effect a general assignment. *Smith v. Woodruff*, 1 Hilt. 462.

It is said by Chan. Kent, in *Nicoll v. Mumford* (4 Johns. Ch. 522, 529), referring to *Brown v. Minturn* (2 Gall. 557), that if the assignment is directly to creditors, their assent is necessary in law to give validity to the deed; but if the assignment be to trustees, for their use, the legal estate passes and vests in the trustees, and chancery will compel the execution of the trust for the benefit of the creditors, though they be not at the time assenting and parties to the conveyance. As to the first of these propositions, so far as it appears to hold that proof of an express acceptance is necessary in the case of a conveyance direct to a creditor, the point was not necessary to the determination of the case of *Nicholl v. Mumford* (*supra*); and in *Van Buskirk v. Warren* (4 Abb. Dec. 457, 460) Mr. Justice Potter expressed a decided opinion that, in the case

of an assignment directly to a party having a direct beneficial interest in the acceptance of an assignment, the presumption is that the assignee accepts the title, and the *onus* is upon the party claiming in hostility to show that there never was an acceptance. Citing *Nicholl v. Mumford*, *supra*, and *Moir v. Brown*, 14 Barb. 39, 45.

Whatever may be the rule in that class of cases, it has been held in this State, from an early time, that, in the case of conveyances to a trustee for the benefit of creditors made in good faith, and without conditions deemed injurious to their interests, the legal estate vests at once in the trustee, and the assent of creditors is presumed, unless the contrary is proved. *Cunningham v. Freeborn*, 11 Wend. 240, 248, 249; *Nicholl v. Mumford*, 4 Johns. Ch. 522; *Halsey v. Whitney*, 4 Mason, 206; *Thompkins v. Wheeler*, 16 Pet. 118. But by this, of course, it is not to be understood that there is no necessity for an acceptance on the part of the assignee. Such an acceptance is essential to the validity of the instrument, both at common law (*Crosby v. Hillyer*, 24 Wend. 280; *Jackson v. Phipps*, 12 Johns. 418), and under the statute. Laws of 1877, ch. 466, §§ 2, 7.

§ 133. *The right to assign.*—Assignments for the benefit of creditors are said to have been an American device (Selden, J., in *Dunham v. Waterman*, 17 N. Y. 9, 15), and of recent origin. Tracy, Senator, in *Grover v. Wakeman*, 11 Wend. 187; but see *Bamford v. Bacon*, 2 Term R. 594, and *Tappenden v. Burgess*, 4 East, 220. They are said, also, to have originated in the desire of creditors to perpetuate their own control over the property in their hands. Selden, J., in *Dunham v. Waterman*, *supra*, 16.

The right to make such conveyances depends ultimately upon the absolute dominion which a person has over his property, by which he can make any disposition which he pleases of it not inconsistent with the rights of others. Ch. J. Marshall, in *Brashear v. West*, 7 Pet. 608, 614.

An insolvent debtor, at any time before his property becomes bound by any lien, may assign it over to trustees for the benefit of all his creditors. The assignment is to be referred

to an act of duty, attached to his character of debtor, to make the fund available for the whole body of his creditors. Kent, Ch., *Nicoll v. Mumford*, 4 Johns. Ch. 522. And a debtor, in securing an equal distribution of his property among his creditors, is performing a moral duty. 2 Spence Eq. Jur. 350, citing *Pickstock v. Lyster*, 3 Maule & S. 374.

Such assignments, especially when they have been made for the equal benefit of all creditors, have uniformly received the approbation of the judicial tribunals before which they have been brought. Field, J., in *Mayer v. Hellman*, 91 U. S. (1 Otto), 496, 500. Story, J., in *Brown v. Minturn*, 2 Gall. 557, 559.

§ 134. *The effect of the assignment.*—The effect of a general assignment must be determined in each instance by the terms and construction of the instrument itself. It may, however, assist in the study of the subject, to state in a general way some of the necessary effects of every general assignment.

It is to be constantly borne in mind that assignments for creditors are simply deeds of trust. They have no other efficacy or effect than can be derived from the deed of trust. When the conveyance is of all the debtor's property for the benefit of all his creditors, they amount to a complete cession of his estate for his creditors. But the surrender of the property is not a surrender to the law for the purpose of administration by the law, like a commission or assignment in bankruptcy, but is a private trust vesting in general only such a title in the assignee as the assignor has conveyed, and for such purposes only as the assignor has prescribed in the assignment.

As to the assignor, therefore, after the assignment he ceases to have any legal title to the assigned property, and his equitable interest is confined to such *residuum* of the estate as may remain after all the debts directed to be paid have been satisfied. He remains as before, liable for all his unpaid debts, and subject to all legal process. *Butler v. Thompson*, 4 Abb. N. C. 290. The assigned property, however, has ceased to be the debtor's, and is placed beyond the reach of legal process against the debtor or his property. When the assignment is valid, creditors can reach the property only as equity.

As to the assignee, the legal title to the property vests in him, but the beneficial interest is in the *cestuis que trust*, the creditors. The assignee is seized for others, not for himself. The moment he is seized, that moment the substantial interest passes out of him unto others. He is merely the legal recipient or organ by which the conveyance is rendered valid for higher and more beneficial purposes.

As to the creditors provided for in the assignment, their rights become fixed by the execution of the assignment by the assignor, and its acceptance by the assignee. The assigned property becomes appropriated to the payment of their debts. *Murray v. Judson*, 9 N. Y. 73, 83. And they may enforce the trust by all the equitable remedies which the law gives to *cestuis que trust*.

§ 135. *The Act of 1860.*—The method of making general assignments for the benefit of creditors, and of enforcing the trusts which they create, was first regulated by statute in this State in 1860 (Laws of 1860, ch. 348). That act required that the assignment should be made in writing, and should be acknowledged and recorded (§§ 1, 6). It also required the debtor within twenty days after making the assignment, to make and deliver to the county judge of the county in which the debtor resided, an inventory or schedule precisely as required under the two-third act (see § 24, *supra*). It provided, also, that the assignee should within thirty days after the date of the assignment, and before he should have power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property, execute a bond to the people of the State for the faithful performance of his duties (§ 3). After the lapse of a year from the date of the assignment, the county judge was empowered upon petition of any creditor of the debtor to issue a citation compelling the assignee to appear and show cause why he should not account, and to decree the payment of the petitioning creditors proportional part of the fund. The county judge was clothed with the same power and jurisdiction to compel such accounting as is possessed by surrogates in relation to the estates of deceased persons, and with power to examine the parties to the assignment, and other persons in

relation to the assignment and accounting, and to compel their attendance. The right of appeal as from the decrees of a surrogate was also given (§ 4). These, with a provision authorizing the county judge to order the prosecution of the assignee's bond, constituted the substance of the enactment.

In 1867 (Laws of 1867, ch. 680), the section in reference to accountings was amended by inserting a provision that the citation should be served upon all persons interested in the assignment, and setting forth the mode of service, and providing also for a reference to take and report the examination of the assignee, and providing for the protection of the assignee upon the accounting, against claims of creditors.

In 1870 (Laws of 1870, ch. 92), these amendments were all abrogated, and the section was restored to its original form, with the exception that the petition could be made by a surety as well as by any person interested in the estate.

In 1872, the same section was again amended by setting out fully how the citation should be served, and providing that all laws governing surrogates on accountings should be applicable to these proceedings, and that the county judge should have all the powers of surrogates therein. The amendment authorized a reference, and provided for a transfer of the proceedings to the county judge of some adjoining county, when the county judge having original jurisdiction should become incapacitated, and for the continuance of the proceedings in case of the death of the assignee.

In 1873 (Laws of 1873, ch. 363), the fifth section of the act was amended so that in the case of the removal of the assignee and the substitution of another assignee, the substituted assignee might prosecute the bond of his predecessor.

In 1874, for the purpose of obviating the decision in the case of *Juliand v. Rathbone* (39 N. Y. 369), where it was held that a failure to make and deliver the inventory and schedule required by the second section had the effect to render the assignment void, it was enacted (Laws of 1874, ch. 600), that in case the debtor should omit or refuse to make and deliver the inventory and schedule, the assignment should not for that reason become invalid, but the assignee was authorized within six months after the date of the assignment to make and file

the inventory and schedule required, and to compel a discovery by the assignor for the purpose of the preparation of the inventory and schedule.

This act also provided that the county judge might authorize the assignee to advertise for claims of creditors, and specified the manner in which the advertisements should be made.

This act having extended the time within which the inventory and schedule might be filed for six months, left the provision requiring the assignee's bond to be filed within thirty days after the date of the assignment. Inasmuch as the inventory of property, was essential to enable the court to fix the penalty of the bond a serious inconvenience arose, and the next year (Laws of 1875, ch. 56), the third section of the act was altered by changing the time within which the assignee's bond was required to be filed from thirty days after the date of the assignment, to ten days after the delivery of the inventory or schedule. This act also amended the fourth section in reference to accountings, by restoring the section as it originally read in the act of 1860, with the addition of a clause providing for a reference to take and state the assignee's account.

The various decisions under the act of 1860 and its amendments are to be found under the special topics to which the different provisions of the act relate.

§ 136. *The general assignment act of 1877.*—The general assignment act of 1877 (Laws of 1877, ch. 466), repealed the act of 1860 and all the enactments mentioned in the previous section, and substituted in their stead a much more comprehensive system for the administration of the assigned estate, and the enforcement of the equitable interests of creditors in the trust property. It retained all the features of the act of 1860 and its amendments, and supplemented them by what was intended to be a summary and complete proceeding in the county court, for the administration and distribution of the estate without resort to a court of equity. This act was amended in 1878 (Laws of 1878, ch. 318), but inasmuch as each of the sections of the act as amended are cited and discussed in the following chapters, no further reference to their details is here required.

CHAPTER IX.

PARTIES TO ASSIGNMENTS.

§ 137. *In general.*—The formal parties to an assignment are ordinarily the assignors and the assignee. Creditors are not necessary, and usually not proper, parties to the instrument (see § 139).

Under the act of 1877 (Laws of 1877, ch. 468, § 1), it is required that “the assent of the assignee, subscribed and acknowledged by him, shall appear in writing embraced in or at the end of, or indorsed upon, the assignment before the same is recorded, and if separate from the assignment, shall be duly acknowledged.”

§ 138. *Assignments, by whom made.*—Any person capable in law of entering into a contract, may execute an assignment for the benefit of creditors. It was held in the case of *Fox v. Heath* (21 How. Pr. 384), that an assignment executed by partners, one of whom was an infant, was void, for the reason that the instrument, being voidable by the infant, the conveyance was not absolute and irrevocable, and was consequently fraudulent as to creditors. This doctrine was disapproved, however, in *Yates v. Lyon* (61 N. Y. 344; rev’g 61 Barb. 205). In that case the infant had ratified the deed after he came of age. Independent of that fact, it seems that an appropriation of firm property to the payment of firm debts would bind the infant partner even without his assent.

Previous to the married woman’s act of 1860 (Laws of 1860, ch. 90), a married woman was disabled by her coverture from making a general assignment of a stock in trade with which she was conducting business. *Cropsey v. McKinney*, 30 Barb. 47. Nor did the fact that the husband assented that the business should be conducted in her name, carry with it an implied authority that she might make an assignment for the benefit of creditors. *Cropsey v. McKinney*, *supra*, 58. But the act of

1860, which provides that a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, seems to confer the authority to make a general assignment.

There is nothing in the assignment laws of this State which excludes a non-resident from the right to make an assignment of property within this State, simply because he is a non-resident. *Scott v. Guthrie*, 10 Bosw. 408, 416; s. c. 25 How. Pr. 512. These acts are intended to apply only to assignments by a debtor or debtors residing in this State. *Ockerman v. Cross*, 54 N. Y. 29.

§ 139. *Creditors, when proper parties.*—It is not necessary for the creditors to be parties to, or to assent to, the assignment. *Cunningham v. Freeborn*, 11 Wend. 240, 248; see *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 129. When the assignment is manifestly for the advantage of creditors, and contains no provisions prejudicial to them, their assent will be presumed, unless the contrary appears. *Nicoll v. Mumford*, 4 Johns. Ch. 522, 529, Kent Ch.; *Brown v. Minturn*, 2 Gal. 557; *Lawrence v. Davis*, 3 McL. 177; *Fellows v. Greenleaf*, 43 N. H. 421.

The legal estate will pass to and vest in the assignees, although the creditors are not at the time assenting and parties to the conveyance. *Nicoll v. Mumford*, *supra*; *Halsey v. Whitney*, 4 Mason, 206, 214.

If the assignment is drawn with the design that it should be executed by the creditors, or expressly requires their assent or acquiescence, they must execute it or express their assent in the required manner before it will be effectual as to them. *Lawrence v. Davis*, *supra*; *Shearer v. Loftus*, 26 Ala. 703; *Brown v. Lyon*, 17 Id. 659.

And when the assignment requires some act to be done which is not presumptively for the benefit of the creditor, as, for instance, where it requires the creditor to execute a release to the debtor, it will not be effectual as against the creditors, unless assented to, and in such cases the creditors would be proper parties to the instrument. *Wakeman v. Grover*, 4 Paige, 23; s. c. 11 Wend. 187.

The English as well as the Massachusetts doctrine in refer-

ence to the implied assent of creditors, is different. Lewin on Trusts, 5th ed. 354; Burrill on Assignments, 3d ed. 386, 387.

§ 140. *Assignments by corporations.*—"It appears to be settled," says Chan. Walworth, in *De Ruyter v. The Trustees of St. Peters' Church* (3 Barb. Ch. 119, 124; *aff'd* 3 N. Y. 238), "by a weight of authority, which is irresistible, that a corporation has a right to make an assignment in trust for its creditors, and may exercise that right to the same extent and in the same manner as a natural person, unless restricted by its charter or by some statutory provision." This opinion is sustained by a number of very eminent authorities. *Hastun v. Bishop*, 3 Wend. 13; *Bowery Bank Case*, 5 Abb. Pr. 415; *Hill v. Reed*, 16 Barb. 250; *Hurlbert v. Carter*, 21 Barb. 221; *Nelson v. Edwards*, 40 Barb. 279; *Bank of Tenn. v. Ellicott*, 6 Gill & J. 363; *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205; *Town v. Bank of River Raisin*, 1 Doug. (Mich.) 530; *Robins v. Embry*, Smede & M. Ch. 207; *Beaston v. Farmers' Bank of Delaware*, 12 Pet. 102; *In re Conway*, 4 Ark. 302; *Ringo v. Biscoe*, 13 Ark. 563; 2 Kent, 315; see Southern Law Review, vol. III, N. S. 553.

But an assignment of all the property of a corporation does not operate as a transfer of the corporate franchise, nor does it work a dissolution of the company. *De Ruyter v. The Trustees of St. Peters' Church*, *supra*; *Hurlbert v. Carter*, *supra*; *State of Maryland v. Bank of Maryland*, *supra*; *Town v. Bank of River Raisin*, *supra*.

In *Abbott v. American Hard Rubber Co.* (33 Barb. 578; s. c. 21 How. Pr. 193), it was held that a transfer by a majority of the directors of a corporation, of the entire property of the company, except its real estate, with its machinery and fixtures, which in effect terminated the business of the company, was void as against stockholders. The transfer in that case did not purport to be for the benefit of creditors (p. 584). *Smith v. N. Y. Consolidated Stage Co.* (18 Abb. 419), was the case of an assignment by a corporation acting under a resolution adopted by a majority of the directors, of all the corporate property to assignee to sell, and pay creditors *pro rata*, it was held that if the corporation was solvent the act of the directors was *ultra*

vires and a fraud upon the stockholders. The decision, however, seems to have gone upon the ground that the transfer was made in contemplation of insolvency, and was therefore void under the statute about to be cited.

Although the power of a corporation to make an assignment is unlimited at common law, except as in the case of natural persons, yet the statutes of this State have restricted the right to a very considerable extent.

In 1825 (Laws of 1825, ch. 325), the Legislature passed an act entitled "An Act to prevent fraudulent bankruptcies by incorporated companies," &c., and by the seventh section of that act provided: "That whenever any incorporated company shall have refused the payment of any of its notes or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer and assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void."

This provision was incorporated verbatim into the Revised Statutes. 1 R. S. 603, § 4; 2 R. S. 6th ed. 399; 1 Edm. 560; 1 Fay's Dig. 230.

A subsequent section (2 R. S. 604, § 11, as amended Laws of 1871, ch. 883), provides that the provisions of the title of the Revised Statutes in which the section occurs, shall not apply to any religious society nor to any moneyed corporation which shall have been or shall be created, or whose charter shall be renewed or extended after January 1st, 1828, and which shall be subject to the provisions of the second title of the eighteenth chapter of the first part of the Revised Statutes.

In the case of *Haxtun v. Bishop* (3 Wend. 13), decided under the act of 1825, an assignment executed after a bank had stopped payment to persons other than officers or stockholders, in trust to apply the proceeds to the payment of all the creditors of the bank in equal proportions, was considered valid, but the case turned upon another point. See *Harris v. Thompson*, 15

Barb. 62, 65. The opinion of the court was that the assignment was not made in contemplation of insolvency within the provision of the statute. See *Robinson v. Bank of Attica*, 21 N. Y. 406, 411; *Heroy v. Kerr*, 8 Bosw. 194. In *Harris v. Thompson* (15 Barb. 62), it was decided that an assignment made by a corporation in contemplation of insolvency, although it had not in fact stopped payment, was within the statute, and the assignment was adjudged void. This opinion was approved by the court of appeals in *Sibell v. Remsen*, 33 N. Y. 95. Both of the cases last cited were instances of assignments made by corporations organized under the act of 1848, for the formation of manufacturing companies.

In reference to such corporations it has been expressly held that a general assignment for the benefit of creditors, made by a corporation organized under the act of 1848, when insolvent, or in contemplation of insolvency, is absolutely void. *Loring v. U. S. Vulcanizing Gutta Percha Co.* 30 Barb. 643; *aff'd* 36 Barb. 329.

It is no answer to the operation of the statute declaring the assignment void, that the instrument itself provides for an equal distribution of the assets among the creditors. The legislature may have deemed it desirable that the administration of assets should be made by a receiver appointed by the court rather than by an assignee selected by its own officers. *Ibid.* 36 Barb. 330, 331.

The section of the Revised Statutes cited above is applicable to all corporations except those which are expressly exempted by the subsequent section cited. 2 R. S. 604, § 11. Hence, where a railroad corporation was organized under a special charter by which it was made "subject to the general restrictions and liabilities prescribed by such parts of the 3d title of the 18th chapter of 1st part of the Revised Statutes as are not repealed," it was held that this express allusion to a specified portion of the statute did not exempt the corporation from the operation of the 4th title of the same chapter in which the section cited above occurs. *Bowen v. Lease*, 5 Hill, 221.

§ 141. *Banking associations.*—Banking associations organized under the act of 1838 (Laws of 1838, ch. 260), although corporations as now determined by the weight of authority

(*People v. Supervisors*, 4 Hill, 20; *Willoughby v. Comstock*, 3 Id. 389; *People v. Assessors of Watertown*, 1 Id. 616 *Leavit v. Blatchford*, 5 Barb. 9; s. c. 17 N. Y. 521; *Gillet v. Moody*, 3 N. Y. 479; *Cuyler v. Sanford*, 8 Barb. 225), are not subject to the provisions of the 2d title of the 18th chapter of the Revised Statutes, and are not therefore included in the exception to the 11th section, and consequently come under the operation of the section which we are now considering. Such corporations when insolvent, or in contemplation of insolvency, cannot make a general assignment. *Robinson v. Bank of Attica*, 21 N. Y. 406; *Curtis v. Leavit*, 15 N. Y. 9; *Leavit v. Blatchford*, 17 N. Y. 521; see *Dutcher v. Importers' & Traders' Nat. Bank*, 59 N. Y. 5.

§ 142. *Moneyed corporations.* — Moneyed corporations which have been created, or whose charters have been renewed or extended after January 1st, 1828, and which are subject the provisions of the 2d title of the 18th chapter of the 1st part of the Revised Statutes, are expressly exempted from the operation of the section of the statute cited in the last heading of this work. 2 R. S. 604, § 11.

Such corporations are governed by other provisions. Thus it is provided that “no conveyance assignment or transfer not authorized by a previous resolution of its board of directors, shall be made by any such corporation of any of its real estate, or of any of its effects, exceeding the value of one thousand dollars,” &c. 1 R. S. 591, § 8; 3 R. S. 6th ed. 298; 1 Edm. 549.

And it is further provided, “no such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefor to the creditors or stockholders, or their trustees, as the case shall require.” 1 R. S. 591, § 9; 3 R. S. 6th ed. 298, § 9; 1 Edm. 549.

In *Brouwer v. Harbeck* (9 N. Y. 589), it was held that under this section an assignment by a corporation actually, though

not avowedly insolvent or in contemplation of insolvency, which actually ensues, are to the intent to give a preference is void. In delivering the opinion of the court, Mr. Justice W. F. Allen says: "So long as insolvency neither exists nor is contemplated, the corporation, like an individual, can appropriate its means to the payment of its debts in such order and in such amounts and proportions as the directors please. But, upon insolvency, either actual or contemplated, this power ceases, and the law declares the absolute right of every creditor to share *pro rata* in the assets of the company, and will not suffer this right to be defeated by any act of the corporation or its officers." See s. c. below opinion of Bosworth, J., 1 Duer, 114; *Marine Bank v. Clements*, 31 N. Y. 33; *Dutcher v. Importers & Traders' Nat. Bank*, 59 N. Y. 5. But, whether an assignment by a solvent corporation would not be void by the statute of frauds, see *Matter of Empire Savings Bank*, 10 How. Pr. 498, 502.

It seems clear from these provisions in reference to moneyed corporations, that a general assignment without any intent of giving preferences, and for the equal benefit of all creditors, is a proper and legal act, and within the corporate powers of such companies. *Bowery Bank Case*, 5 Abb. Pr. 415; s. c. 16 How. Pr. 56; *Hurlbert v. Carter*, 21 Barb. 221; *Hill v. Reed*, 16 Barb. 280; *Curtis v. Leavit*, 15 N. Y. 9, 110.

Insurance companies are moneyed corporations, and come within the operation of the section cited prohibiting preferences. *Hill v. Reed*, 16 Barb. 280; *Hurlbert v. Carter*, 21 Barb. 221.

§ 143. *Assignments by partners of partnership property.*

—In regard to partnership affairs generally, each partner being the agent of all, has the right of disposing of all or any part of the partnership effects for any purpose falling legitimately within the scope of the object for which they have associated together. An absolute sale, therefore, by a single partner, of the entire partnership stock, or a transfer directly by him of all the joint property to creditors in payment of debts, though the act should virtually lead to the dissolution of the firm, is clearly within his powers. *Graser v. Stelhwagen*, 25 N. Y. 315; *Mabbett v. White*, 12 N. Y. 442; *Van Brunt v. Applegate*, 44 N. Y. 544; *McClelland v. Remsen*, 3 Abb. Dec. 74; aff'g 36

Barb. 622; *Egbert v. Wood*, 3 Paige, 517; *Haggerty v. Granger*, 15 How. Pr. 243; see *Kimball v. Fire Ins. Co.* 8 Bosw. 495.

But a transfer of the entire partnership property to a trustee is of a different character. The distinction is clearly pointed out by Daly, J., in *Fisher v. Murray* (1 E. D. Smith, 341, 344). He says "When a partner makes a sale of the entire partnership effects in the course of trade, or transfers the whole of the joint property to creditors in the payment of debts, it is not necessary that the other partners should be consulted. His right to do so is undoubted. The necessity for consulting the others in the case of an assignment, however, grows out of the circumstance that the assignment conveys the property not to creditor's directly, but to a trustee. From the fact that the assignment is an act which virtually puts an end to the partnership, which divests the partners of all future control over their affairs, and confides the administration of them to a person who is to act thereafter in their place and stead. A trustee is substituted for the firm, who, in the sale and disposition of its assets, and in the general winding up of its affairs exercises a greater or less amount of discretion. It is in the selection of the person to whom so important a trust is to be committed that all the partners have a right to be consulted, and whose appointment, therefore, must be a joint act." This doctrine has not uniformly prevailed. See *Anderson v. Thompkins*, 1 Brock. 456, Marshall, Ch. J.; *Robinson v. Crowder*, 4 McCord L. 519; Story on Partnership, 145-150; Burrill on Assignments, 3d ed. 90-113. But in this State it is settled by overwhelming authority, that one partner is not authorized to execute an assignment for the benefit of creditors except with the consent and concurrence of all the partners, for the reason that authority to make such an instrument is not implied by the act of partnership, and consequently cannot be inferred or presumed from the partnership relation. *Welles v. Marsh*, 30 N. Y. 344; *Robinson v. Gregory*, cited in *Welles v. Marsh*, *supra*; rev'g s. c. 29 Barb. 500; *Wetter v. Schlieper*, 6 Abb. Pr. 123; s. c. 4 E. D. Smith, 707; *Hitchcock v. St. John*, Hoffm. Ch. 511; *Fisher v. Murray*, 1 E. D. Smith, 341; *Haggerty v. Granger*, 15 How. Pr. 243; *Pettee v. Orser*, 6 Bosw. 123; *Havens v. Hussey*, 5

Paige, 30; *Deming v. Colt*, 3 Sandf. 284; *Gates v. Andrews*, 37 N. Y. 657; *Paton v. Wright*, 15 How. Pr. 481; *Coope v. Bowles*, 18 Abb. 442; s. c. 28 How. Pr. 10; 42 Barb. 87.

In the earlier cases a distinction was attempted to be drawn between assignments with preferences, and those which were for the equal benefit of all creditors. And it was held that while there was no implied authority to execute an assignment with preferences, yet possibly there might be such a power if the assignment was ratable. *Hitchcock v. St. John*, Hoffm. Ch. 511; see *Havens v. Hussey*, 5 Paige, 30; *Pettee v. Orser*, 6 Bosw. 123; Pars. on Part. 166. But there appears to be no substantial reason why the power should exist in one case if it does not in the other. *Wetter v. Schlieper*, 4 E. D. Smith, 123; s. c. 6 Abb. 123; *Deming v. Cole*, 3 Sandf. 284.

One partner may of course execute a general assignment on behalf of the firm if he is expressly authorized to do so by the other partners. *Lowenstein v. Flaurand*, 18 Supm. Ct. (11 Hun), 399; *Kelly v. Baker*, 2 Hilt. 531; *Baldwin v. Tynes*, 19 Abb. Pr. 32; *Roberts v. Shepherd*, 2 Daly, 110. And such an authority may be implied from circumstances, or acts of the partners not joining in the execution of the instrument.

The following cases illustrate the circumstances under which such an amplication of authority will arise. In *Welles v. Marsh* (30 N. Y. 344), one of the partners absconded leaving a letter addressed to his co-partner in which he said "I hereby assign you my interest in the business of Nace & Co. and Nace & Reinnie; take charge of everything in our business; close it up speedily." This was held by the court of appeals sufficient to confer upon the remaining partner authority to execute an assignment on behalf of the firm. In *Palmer v. Meyers* (43 Barb. 509; s. c. 29 How. 8), and *National Bank v. Sackett* (2 Daly, 397), the act of absconding and leaving the business in the possession of the remaining partners was held to authorize the remaining partner to assign the partnership property for creditors, and to the same effect is *Kelly v. Baker*, 2 Hilt. 531; *Kemp v. Carnley*, 3 Duer, 1.

So, when two partners agreed that if either failed to contribute his proportion of the capital, the other might dissolve and close up the partnership, it was held that if such failure

occurred on the part of one, the other had sufficient authority under the agreement, to execute a general assignment of the of the firm's property for the benefit of creditors, especially where there was evidence that the delinquent partner knew of and consented to the assignment. *Roberts v. Shepard*, 2 Daly, 110.

But the mere fact of the absence of a partner from the country will not be regarded as conferring an authority upon the remaining partners to execute an assignment. *Robinson v. Gregory*, cited in *Welles v. Marsh*, 30 N. Y. 344; rev'g s. c. 29 Barb. 560; *Coope v. Bowles*, 42 Barb. 87; s. c. 28 How. Pr. 10; 18 Abb. Pr. 442; *Pettee v. Orser*, 6 Bosw. 123; see *Sheldon v. Smith*, 28 Barb. 593.

It should be remarked that where any portion of the partnership assets consists of real estate it must be conveyed by the party holding the legal title. "No partner" says Mr. Parsons (*Parsons on Partnership*, 367), "or partners can convey any interest or title in or to real estate not held of record in their names, although it is partnership property beyond all question." A conveyance by one partner who has the legal title to an undivided half of real estate the whole of which in equity is partnership property, can convey a good title to such moiety to a creditor of the firm without the knowledge or consent of his co-partner. *Van Brunt v. Applegate*, 44 N. Y. 544.

§ 144. *Assignment by partner of his interest.*—The interest which each partner has in the partnership property is an interest subject to the rights of all the partners and all the partnership creditors, and this is the only interest which he can convey. A conveyance of that interest, would not vest in the assignee any specific portion of the partnership property, but would give him only the right to call the other partners and those claiming under them, to account and pay over what might remain after the payment of the firm debts and a settlement with the co-partners. *Haggerty v. Granger*, 15 How. Pr. 244, 248, Mitchell, J.; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 50; *Parsons on Partnership*, 160.

Thus, where two firms, one in Havana, the other in New York, entered into an agreement to purchase and ship goods on

joint account, to be consigned to the New York firm, and thus became partners in the joint enterprise, an assignment by the New York firm of all their property in trust for the benefit of their creditors, carried only their residuary interest in the joint property, and the assignee was enjoined from appropriating the whole partnership assets of the two firms to the payment of the separate debts of the New York house. *Davis v. Grove*, 2 Robt. 134, 635 ; s. c. 27 How. Pr. 70.

§ 145. *Assignment after dissolution*.—Where the partnership has been dissolved and the partnership assets transferred in good faith to the continuing partners, they may execute an assignment of the property so transferred in trust for the payment of their debts (*Dimon v. Hazard*, 32 N. Y. 35 ; *Smith v. Howard*, 20 How. Pr. 266), but if such transfer is fraudulent, and made with the intent of defeating the rights of the partnership creditors, it will not be sustained. *Heye v. Bolles*, 2 Daly, 231 ; s. c. 33 How. Pr. 266 ; see *post*, chap. XIII.

§ 146. *Surviving partners*.—Some doubt was suggested in the case of *Hutchinson v. Smith* (7 Paige, 26, 35), as to the power of a surviving partner to assign the partnership property to a trustee with preference. The doubt suggested arose from “the principles adopted by the Revised Statutes in prohibiting preferences from being given in the distribution of the estate of a deceased person among his creditors and depriving insolvent debtors of the benefit of the insolvent laws where they give such preferences after they have become insolvent,” but that case was decided on the ground that the surviving partner had a right to make such an assignment before these provisions of the Revised Statutes were enacted, and that was also the ruling in *Egberts v. Wood*, 3 Paige, 517.

But the policy of the law in reference to the estate of deceased persons and persons petitioning under the insolvent laws, has never been extended, even by implication, to general assignments for the benefit of creditors, and the suggestion of the Chancellor in *Hutchinson v. Smith*, *supra*, has never been applied.

The power of a surviving partner to make a preferential

transfer, was considered and sustained in the case of *Loeschigk v. Hatfield*, 5 Robt. 26; s. c. as *Loeschigk v. Addison*, 4 Abb. Pr. N. S. 210; aff'd 51 N. Y. 660. In that case, however, the assignment was made directly to the creditor.

§ 147. *Limited partnership*.—Under the following statutes, limited partnerships and their members, when insolvent or in contemplation of insolvency, are restricted from making assignments giving any preference to creditors.

The statute is as follows :

“Every sale, assignment or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor, of such partnership or insolvent partner, over other creditors of such partnership; and every judgment confessed, lien created or security given by such partnership, under the like circumstances, and with the like intent, shall be void as against the creditors of such partnership.” 1 R. S. 766, § 20; 3 R. S. 6th ed. 1156.

“Every such sale, assignment or transfer of any of the property or effects of a general or special partner, made by such general or special partner when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership; and every judgment confessed, lien created or security given, by any such partner under the like circumstances, and with the like intent, shall be void, as against the creditors of the partnership.” 2 R. S. 767, § 21; 3 R. S. 6th ed. 1157.

“Every special partner who shall violate any provision of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner.” 2 R. S. 767, § 22; 3 R. S. 6th ed. 1157, § 22.

“In case of the insolvency or bankruptcy of the partnership no special partner shall, except for claims contracted pursuant to section seventeen, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of

the partnership shall be satisfied." 2 R. S. 767, § 23; 3 R. S. 6th ed. 1157, § 23.

The object and proper construction of these sections were carefully considered in *Fanshawe v. Lane* (16 Abb. Pr. 71), and it was there held that these sections apply not only to preferences by the firm, or any of its partners, in assignments of the firm property; but also to assignments by the individual members of their individual property, including their interest in the firm effects. It was also held that where one of the members of the limited partnership was at the same time a member of a general co-partnership, which had executed an assignment of its property, this did not convey the individual partner's interest in the property of the limited partnership, and was not therefore affected by the statute.

The statute appears to have constituted the effects of the firm a special fund for the benefit of all the creditors of the firm, to be distributed in case of insolvency among such creditors ratably. *Walworth, Ch.*, in *June v. Lansing*, 7 Paige, 583, 585. And any attempt to create a preference in favor of one creditor, or class of creditors, over another, is rendered void against the creditors of the firm. *Mills v. Argall*, 6 Paige, 577; see *Van Alstyne v. Cook*, 25 N. Y. 492.

So an assignment by a limited partnership, after the firm has become insolvent or in contemplation of insolvency, is void as against the creditors of the firm, if it provides for the payment of a debt due to the special partner ratably with the other creditors of the firm, or before all the general creditors are satisfied in full for their debts. *Mills v. Argall, supra*.

But an assignment made by a limited partnership in good faith for the equal benefit of all creditors is valid. *Robinson v. McIntosh*, 3 E. D. Smith, 221. Indeed it seems to be regarded as the duty of the partners, in case of insolvency of the firm, to make such a disposition of the property. *Whitewright v. Stimpson*, 2 Barb. 379; *Jackson v. Sheldon*, 9 Abb. Pr. 127. And the neglect to do so will be a sufficient ground for the appointment of a receiver.

Some question has arisen as to the right of the general partners to make a general assignment of the firm property without the consent of the special partner. *Mills v. Argall*, 6 Paige,

577, 582; and see *Hayes v. Heyer*, 3 Sandf. 393; *Havens v. Hussey*, 5 Paige, 30. But in *Robinson v. McIntosh* (3 E. D. Smith, 221), an assignment executed by the general partners only was held valid. And see *Darrow v. Bruff*, 36 How. Pr. 479.

§ 148. *To whom the assignment may be made.*—The law permits the debtor to select the assignee who is to execute the trust, without the consent of his creditors, and even without consulting a single creditor. Learned judges throughout the Union have first combated, and then deprecated the sanction of such assignments. And it was with much doubt and difficulty that entire latitude in the selection of the trustee was finally conceded to the assignor. Sandford, A. V. C., in *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Webb v. Daggett*, 2 Barb. 11.

The right to select the assignee is unlimited, except by the control which courts may have in removing an improper trustee and in the single instance of a corporation which has made default in payment, in which case it cannot make an assignment to an officer or stockholder of such company. See *ante*, § 140.

The assignment may be made to a creditor, or to one who is not a creditor; but a judgment creditor, by accepting an assignment as assignee, waives his right to enforce his judgment by levy and sale under execution. *Hawley v. Mancius*, 7 Johns. Ch. 174; *Rogers v. Rogers*, Hopk. Ch. 515. For the reason that the assignee must sell, pay, and distribute in the character of a trustee, and not of a judgment creditor; and to take out an execution upon the judgment against property over which he is exercising a discretion and control as trustee, would be incompatible with a due discharge of the trust, and a manifest breach of it. Chan. Kent, in *Hawley v. Mancius*, 7 Johns. Ch. 174, 185.

Some authorities have gone so far as to hold that an assignee who is a judgment creditor, not only waives his right to sell under execution upon his judgment, but that he in effect waives his lien, and consents to come in as a general creditor, except so far as he is preferred by the assignment. *Harrison v. Mock*, 10 Ala. 185; s. c. 16 Ala. 616. But the decisions in this State do not appear to necessarily lead to such a determination.

An assignment by partners cannot be made to one of the firm. *Sewall v. Russell*, 2 Paige, 175.

The assignee must be named in the instrument. *Reamer v. Lamberton*, 59 Penn. St. 462. A power to name the successor of an assignee, in case the assignee should wish to resign, is void. *Planck v. Schermerhorn*, 3 Barb. Ch. 644.

§ 149. *Selection and qualifications of assignee.*—The selection of a suitable assignee is a matter of some moment, inasmuch as the choice of an improper person may furnish evidence of a fraudulent intent on the part of the assignor, which will avoid the assignment (*Reed v. Emery*, 8 Paige, 417; *Connah v. Sedgwick*, 1 Barb. 210; *Browning v. Hart*, 6 Id. 91), as well as to subject the assignee to removal by the court.

The assignor is bound to select an assignee that will do all that the law requires of a trustee, in respect to the rights of those that have a beneficial interest in the property assigned. *Olmstead v. Herrick*, 1 E. D. Smith, 310.

The following cases furnish illustrations of the rule in reference to the choice of assignees not properly qualified for the performance of their duties: Thus, where the debtor selected for assignees three relatives, of whom, one was incapacitated by his residence, one by blindness, and the third by his want of education, from executing the assignment; this was regarded as strong evidence of an intent on the part of the assignor to keep the control of the property in his own hands, or to appropriate it for his own use and benefit. *Cram v. Mitchell*, 1 Sandf. Ch. 251.

So, where a debtor assigned his property in trust for his creditors to his brother, who, on account of a lingering disease, was unable to attend to business at the time of the assignment, and the debtor himself thought the disease of his brother incurable, and the latter subsequently died of it. It was held that this was sufficient cause for declaring the assignment fraudulent and void as against creditors. *Currie v. Hart*, 2 Sandf. Ch. 353.

The selection of such assignees furnishes strong presumption of an intent on the part of the assignor to keep the control of his property in his own hands and under his own disposal. This is the natural and inevitable result, when the assignee is phys-

ically and mentally incompetent to act efficiently, as well as when his distance from the scene of action, preclude his personal care and supervision. Sandford, A. V. C., in *Currie v. Hart*, *supra*.

And where there are circumstances tending to show that the assignment was made with the intent of keeping the assigned property within the control and disposition of the assignor, this presumption will be rendered conclusive by the selection of the near relatives of the debtor as assignees, placing them all before other creditors in the schedule of preferred debts. *Cram v. Mitchell*, 1 Sandf. Ch. 251.

It has been held, also, that a debtor cannot lawfully assign his property in trust for creditors to an insolvent assignee. *Haggarty v. Pittman*, 1 Paige, 298; *Reed v. Emery*, 8 Id. 417; *Connah v. Sedgwick*, 1 Barb. 210. But the better doctrine seems to be that the mere fact that the assignee is insolvent will not avoid the assignment, or furnish a ground for the removal of the assignee, where there are no other suspicious circumstances and the assignees are otherwise qualified. *Pearce v. Beach*, 12 How. Pr. 404; *In re Paddock*, 6 Id. 215.

And it is thought that this would be especially the case under the present statute, which requires the assignee to give a bond for the faithful performance of his duties, and provides for his removal in case he should fail to do so. Laws of 1877, chap. 466.

§ 150. *Joint assignees*.—The assignment may be made to several persons as well as to one. In such a case only those who accept the trust are required to act. *Moir v. Brown*, 14 Barb. 39. But those who accept must all act. *Brennan v. Willson*, 4 Abb. N. C. 279. A subsequent disclaimer or failure to act with the other assignees will not relieve the renouncing assignee from liability. *Bowman v. Rametaux*, Hoffm. 150. Nor will it authorize the others to act without him. *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Brennan v. Willson*, 4 Abb. N. C. 279. He must either be discharged from the trust by an order or decree of a court of equity, or with the general consent of all persons interested in the execution of the trust. *Cruger v. Halliday*, 11 Paige, 314; *Thatcher v. Candee*, 3 Keyes, 160; *Diefendorf v. Spraker*, 10 N. Y. 246.

CHAPTER X.

MAKING, ACKNOWLEDGING, AND RECORDING THE ASSIGNMENT.

§ 151. *The statute*—The act of 1860 (Laws of 1860, ch. 348, § 1), for the first time regulated the manner of making and executing an assignment in this State. That act provided that the conveyance should be by writing, and should be acknowledged before an officer authorized to take the acknowledgment of deeds, and that the certificate of acknowledgment should be indorsed on the conveyance before delivery to the assignee. Upon the repeal of that act the following section, incorporating and extending the provisions just referred to, was enacted :

“Every conveyance or assignment made by a debtor, of his estate real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds ; and every such conveyance or assignment shall be recorded in the county clerk’s office of the county where such debtor resided or carried on his business at the date thereof. An assignment by co-partners shall be recorded in the county where the principal place of business of such co-partners is situated. Where real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the assignee, subscribed and acknowledged by him, shall appear in writing embraced in or at the end of, or indorsed upon the assignment, before the same is recorded and, if separate from the assignment, shall be duly acknowledged.” Laws of 1877, ch. 466, § 2.

The statute prescribes no form in which the writing shall be drawn. Very informal instruments may constitute a general assignment. It is not necessary that the trusts should be de-

clared in the writing. Parol proof may be introduced for the purpose of showing the trust. *Britton v. Lorenz*, 45 N. Y. 51; aff'g 3 Daly, 23. Thus in the case just cited, parol proof was introduced to show that a bill of sale, absolute on its face, was really made upon the trust that the defendants should convert the property into money, and from the proceeds pay all the vendor's debts for borrowed money in full, and distribute the residue *pro rata* among all his other creditors. The instrument was held invalid as a general assignment because not acknowledged.

So also several instruments may be construed together for the purpose of showing the true legal character of the transaction. Thus, since the statute, a deed of real estate, a bill of sale of personal property, and articles of agreement between the parties, all bearing the same date and relating to the same subject-matter, were read together as constituting an assignment of property in trust for the benefit of creditors. *Van Vleet v. Slauson*, 45 Barb. 317; see *Wynkoop v. Shardlow*, 44 Barb. 84; s. c. 29 How. Pr. 368; *Man v. Whitbeck*, 17 Barb. 388; *Coddington v. Davis*, 1 N. Y. 186.

Previous to the act of 1860, an assignment by a debtor of his property to an assignee in trust for creditors, might, under certain circumstances, have been made without writing, or if in writing, need not have been acknowledged before any officer before delivery to the assignee, in order to be valid and effectual, to accomplish the purpose intended. *Fairchild v. Gwynne*, 16 Abb. 23.

But see *Smith v. Woodruff* (1 Hilt. 462), where a doubt was expressed by Brady, J., as to whether a trust *eo nomine* for the benefit of creditors, could be created by parol.

§ 152. *Form of the assignment.*—The usual form of assignment in this State consists of a simple conveyance of the debtor's property, and a declaration of the trusts with a power of attorney annexed. The very large number of cases to which we shall hereafter have occasion to refer, in which assignments have been held invalid on their face, have, for the most part, arisen from an attempt on the part of the draughtsman to reserve some form of benefit to the assignor. "We have never heard of a

case," says Mr. Justice Sanford, in *Litchfield v. White* (3 Sandf. 545), "nor do we believe there has ever been one decided in this State, in which an assignment has been held fraudulent, which simply vested the debtor's estate in trustees, and directed them to convert it into money and apply it absolutely and without reserve to the payment of his debts, whether equally among all the creditors or with preferences."

"An assignment," says Mr. Justice Selden, "drawn precisely as it ought to be, will not undertake to speak to the assignee in regard to his duties under the trust. Those duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument. A trustee is always bound by any restrictions contained in the writing which creates the trust, and if these are inconsistent with the rights of creditors, the trust itself must fall to the ground." *Ogden v. Peters*, 21 N. Y. 23.

The assignee is a sort of substitute for the officers of the ~~land~~ ^{law}, and he must be left to act under the obligations and responsibilities which the law imposes. The assignor can neither prescribe conditions, nor invest the assignee with powers which tend in any degree to vary or modify the duties which the law devolves upon him. Any clause in the assignment, therefore, which could be legitimately set up by the assignee as a justification for a course of misconduct in regard to the assigned property in any respect different from that which the law would dictate, of necessity vitiates the assignment. *Jessup v. Hulse*, 21 N. Y. 168, 169, Selden, J.

§ 153. *Contents of the assignment.*—The assignment is drawn with the usual formalities of a deed of conveyance of two parts. It has been customary to commence the instrument with a general recital of the insolvency of the grantor, and sometimes of the circumstances which led to the making of the assignment. Such recitals, while they may be evidence between parties and privies, are not evidence against strangers or third parties. *Kellogg v. Slauson*, 15 Barb. 56, 57; see *Huntington v. Havens*, 5 Johns. Ch. 23. They should be drawn with care to avoid a construction of an intent on the part of the debtor to hinder or delay his creditors. In *Brigham v. Tilling-*

hast (15 Barb. 620), where the recital was that one purpose of the assignment was to secure the application of the property to the payment of the debts of the assignor in a fair and equitable manner, and "without *sacrifice*," the language was criticised as not happily selected. See s. c. reversed on another ground, 13 N. Y. 215; but see *Vernon v. Morton*, 8 Dana (Ky.) 247, 263.

In general it is not desirable to do more than to direct in general terms a sale of the property and collection of the debts assigned, and to designate to what debts and in what order the proceeds shall be applied. *Dunham v. Waterman*, 17 N. Y. 9; s. c. 6 Abb. Pr. 357; 3 Duer, 166; *Jessup v. Hulse*, 21 N. Y. 168; s. c. 29 Barb. 539; *Litchfield v. White*, 3 Sandf. 545.

§ 154. *Consideration*.—The conveyance is ordinarily upon a nominal consideration. Such a consideration is sufficient to transfer the legal title. "The amount of the consideration," says Nelson, J., in *Cunningham v. Freeborn* (11 Wend. 240, 250; s. c. 1 Edw. Ch. 256; 3 Paige, 537), "was never material for this purpose, and it seems to be well settled that the relation of debtor and creditor between the parties and the legal consequences of the assignment constitute a sufficient consideration as between them." *Lawrence v. Davis*, 3 McL. 177; *Halsey v. Whitney*, 4 Mason, 206, 214; see *Kellogg v. Stauson*, 15 Barb. 58; s. c. 11 N. Y. 302; see *Rockwell v. McGovern*, 69 N. Y. 294. While this consideration is sufficient to support the conveyance, yet, as we shall see hereafter, the assignee does not thereby become a purchaser for value so as to defeat any pre-existing equities.

§ 155. *The conveyance*.—If the purpose is to make a general assignment, and to include all of the debtor's property in the conveyance, the description should conform to this intention. We shall consider hereafter (see Chap. XI) the circumstances under which an assignment of all the debtor's property is required.

§ 156. *Description of assigned property*.—The description of the property intended to be assigned must be sufficiently certain to enable the assignee to distinguish it (*Crow v. Ruby*,

5 Mo. 484; *Ryerson v. Eldred*, 18 Mich. 12; *Bellamy v. Bellamy's Ad.* 6 Fla. 62); but if it may be made certain by parol it is sufficient. *State v. Keeler*, 49 Mo. 548; *Hatch v. Smith*, 5 Mass. 42; *Emerson v. Knowler*, 8 Pick. 63; *Pingree v. Comstock*, 18 Id. 46; *Kevan v. Branch*, 1 Gratt. 274.

A general description as of "all and singular the goods and chattels, merchandise, bills, bonds, notes, book accounts, claims and demands, choses in action, books of account, judgments, evidences of debt, and property of every name and nature whatever," is not void for uncertainty, although no inventory of the property be attached to the assignment, or be provided for in it. *Kellogg v. Slawson*, 15 Barb. 56; s. c. 11 N. Y. 302; *Matthews v. Poultney*, 33 Barb. 127. And, indeed, since the act of 1860, providing for the making and filing of an inventory of the property, such general description is the usual form. *Terry v. Butler*, 43 Barb. 395; *Matthews v. Poultney*, 33 Barb. 127. But the general terms employed must be sufficiently apt to embrace all the property intended to be covered by the assignment. Thus, where the assignment was of "all the goods, chattels and effects, and property of every kind, personal and mixed," it was held that the words "personal and mixed," limited the conveyance to personal estate. *Rhoads v. Blatt*, 16 N. B. R. 32.

If in addition to the general terms of conveyance, the assignment refers to the property as enumerated and described in a schedule annexed, it has been held that the description in the schedule would limit the effect of the previous general conveyance. *Wilkes v. Ferris*, 5 Johns. 335; *State v. Howland*, 4 Wheat. 108; *Mims v. Armstrong*, 31 Md. 87; *Rundlett v. Dale*, 10 N. H. 458; *Driscoll v. Fiske*, 21 Pick. 503. But in *Turner v. Jaycox* (40 N. Y. 470), where the schedule contained no reference to the personal property, which was included in the terms employed in the body of the instrument, it was held that the reference to the schedule annexed did not limit the operation of the conveyance on the principle of construction prohibiting a false or erroneous addition from vitiating what had been previously sufficiently and fully described. And see *Platt v. Lott*, 17 N. Y. 478.

§ 157. *Schedule, when to be annexed.*—Where the description in the body of the assignment is of all the debtor's property, with a reference to schedules, and the schedules in fact are not annexed at the time of the delivery of the instrument, such omission will not invalidate the assignment. *Birchell v. Strauss*, 28 Barb. 293; *Spring v. Strauss*, 3 Bosw. 607; *Turner v. Jaycox*, 40 N. Y. 470; *Platt v. Lott*, 17 N. Y. 478; *Clapp v. Smith*, 16 Pick. 247; *Brashear v. West*, 7 Pet. 608. *Contra, Moir v. Brown*, 14 Barb. 39. But a different rule prevails when the assignment designates the debts to be paid by reference to a schedule annexed. *Kircheis v. Schloss*, 49 How. Pr. 284; *Averill v. Loucks*, 6 Barb. 470; *Hogtop v. Neidig*, 17 Abb. Pr. 332; see *infra*, § 161. *Truany v. Smith* 47 Hun 119

The schedules required to be filed under the act are the subject of consideration in another place. The schedules so required to be filed are regarded a part of the assignment. *Terry v. Butler*, 43 Barb. 395; *De Camp v. Marshall*, 2 Abb. N. S. 373.

§ 158. *Declaration of trusts.*—The trusts must be declared at the time of the execution of the assignment; they must accompany the instrument or appear on its face. *Grover v. Wakeman*, 11 Wend. 187; *Averill v. Loucks*, 6 Barb. 476; *Sheldon v. Dodge*, 4 Den. 220; *Kircheis v. Schloss*, 49 How. Pr. 284.

The assignment must itself fix and determine the rights of creditors in the assigned property, and not reserve to the assignors, or to the assignee, the power of subsequently doing so. *Kircheis v. Schloss*, 49 How. Pr. 284; *Riggs v. Murray*, 2 Johns. Ch. 565.

The assignee is always bound by any restrictions contained in the writing which creates the trust. *Ogden v. Peters*, 21 N. Y. 23. The conditions attached to the trust are regarded as a part of the transfer, and the conditions and the transfer stand or fall together. *Jessup v. Hulse*, 21 N. Y. 168.

The principal trusts of an assignment for creditors are the trusts to collect the property; to convert it into money by sale, and to distribute the proceeds among the creditors provided for. In addition to these their arises by implication of law a trust for the assignor in any residue which may remain after the payment of the debts.

§ 159. *To convert the property into money.*—A trust to sell lands for the benefit of creditors is one of the express trusts permitted by the Revised Statutes. 1 R. S. 728, § 55; 3 R. S. 6th ed. 1106, § 54. And trusts of personal property for the same purpose are not prohibited. *Nicholson v. Leavitt*, 6 N. Y. 510, 515; *Bishop v. Halsey*, 3 Abb. 400.

Such a trust will be sustained even where it is united with a trust which is void by the statute. As where the conveyance was of real estate upon trust to sell or mortgage the same, and apply the proceeds to the payment of debts, it was held that the instrument was valid as to the trust to sell, although invalid as to the trust to mortgage. *Darling v. Rogers*, 22 Wend. 483; rev'g *Rogers v. De Forrest*, 7 Paige, 272; *Barnum v. Hempstead*, *Ibid*, 568.

Where the assignor conveyed real and personal property in trust to sell and apply the proceeds to the payment of his debts, and to invest the residue for his use during his life, or in case of his death, to pay over and distribute the estate to his heirs at law, it was held that the trust in the surplus for the grantor was void, as being an attempt to create a passive trust, and that after payment of the assignor's debts, the estate vested at once in the grantor. *Kittell v. Osborn*, 4 Supm. Ct. R. (T. & C.) 45; see *Rome Exch. Bank v. Eames*, 4 Abb. Dec. 83.

An assignment for the payment of debts generally, without any limitations or directions, confers upon the trustee the right to ^{sell} ~~sue~~. *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Wood v. White*, 4 M. & Cr. 481; 2 Perry on Trusts, 147.

§ 160. *To pay the expenses of the trust.*—The assignment may provide for the payment of the expenses of administering the trust. Where the assignee was authorized to employ and pay all necessary attorneys, clerks and agents, and it was provided that he should be entitled to, and was thereby authorized to take and have a reasonable compensation for his services, and was authorized to pay and discharge all the just and reasonable costs and expenses attending the due execution of the assignment and the carrying into effect of the trust thereby created, together with a reasonable and lawful compensation for his own services, it was held that the power was not greater than the

law would imply as necessary to carry the trust into execution. *Jacobs v. Remsen*, 36 N. Y. 668; *Bodley v. Goodrich*, 7 How. Pr. 276; *Barney v. Griffin*, 2 N. Y. 365; *Meachem v. Stearns*, 9 Paige, 398. To the same effect are *Butt v. Peck*, 1 Daly, 83; *Iselin v. Dalrymple*, 27 How. Pr. 137; s. c. 2 Robt. 142; *Halstead v. Gordon*, 34 Barb. 422; *Duffy v. Duncan*, 35 N. Y. 187; *Kiteltas v. Wilson*, 36 Barb. 298; *Campbell v. Woodworth*, 24 N. Y. 304; *Eyre v. Beebe*, 28 How. Pr. 333.

But where the assignment authorized the payment of a reasonable counsel fee to the assignee in addition to expenses, costs, and commissions of executing the trusts, it was held to be an appropriation of the assigned property to an illegal purpose, and rendered the assignment void. *Nichols v. McEwen*, 21 Barb. 65; s. c. 17 N. Y. 22.

A provision to pay costs and expenses of suits that may be instituted against the assignor, will invalidate the assignment. *Mead v. Phillips*, 1 Sand. Ch. 83; see *Lentilhon v. Moffatt*, 1 Edw. Ch. 451; *Levy's Accounting*, 1 Abb. N. C. 177.

§ 161. *Designation of debts to be paid.*—If the assignment provides for the payment of certain creditors or classes of creditors in preference to others, the debts or creditors so to be paid must be stated with certainty in the assignment. If the preferred creditors are enumerated in schedules, the schedules must be annexed to the assignment at the time of its execution. *Kirchels v. Schloss*, 49 How. Pr. 284; *Averill v. Loucks*, 6 Barb. 470; *Hotop v. Neidig*, 17 Abb. Pr. 332; see *Scott v. Guthrie*, 10 Bosw. 408, 416, 418.

But it appears that if the persons to whom the preference is to be given are identified, it is not necessary that their names and residences should be stated. Thus where the assignees were directed to first pay to the laborers and workmen of the assignors, residing in Albany and Buffalo, the amounts due to them respectively for work, labor and services done and performed for the assignors, this provision was held to be valid. *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Pratt v. Adams*, 7 Paige, 418.

So, where, after providing for the payment of two classes of preferred creditors, the assignees were directed to advertise for

claims, and that all debts which came to the knowledge of the assignees on or before the day named, should constitute the third class of preferred debts, this provision was considered valid and proper. *Ward v. Tingley*, 4 Sandf. Ch. 476. So in *Butt v. Peck* (1 Daly 83), the persons to whom the preference was intended to be given were designated, but the amounts were left blank, this was regarded as no objection to the assignment. To the same effect are *Platt v. Hodge*, 8 Iowa, 386; *Van Hook v. Walton*, 28 Tex. 59; *England v. Reynolds*, 38 Ala. 370; *Brown v. Know*, 6 Md. 382; *U. S. Bank v. Huth*, 4 B. Mon. 423; *Halsey v. Whitney*, 4 Mason, 206; *Layson v. Rowan*, 7 Rob. (La.) 1.

If the assignment is made for the equal benefit of all creditors, it is not necessary that the creditors should be designated. The statute provides for the making and filing of the schedule of creditors, and that schedule is to be regarded as a part of the assignment. *Terry v. Butler*, 43 Barb. 395; *De Camp v. Marshall*, 2 Abb. N. S. 373.

Where an express trust is created for the benefit of creditors, without any authority to the trustee to give a preference to any, it is both, at law and in equity, a trust for each of the creditors ratably. *Egberts v. Wood*, 3 Paige, 517.

§ 162. *Acceptance by assignee.*—Under the provisions of the statute (*ante*, § 151), the assignee is required to formally accept the assignment in writing. That acceptance binds him to the performance of the trust, and he can be relieved from the duties and liabilities under which he has thus come only by the order of a court of competent jurisdiction. *Brennan v. Willson*, 4 Abb. N. C. 279, and see cases cited in note. And such acceptance is decisive evidence against him. *Mead v. Phillips*, 1 Sand. Ch. 83. An acceptance is essential to the validity of the assignment, independent of the statute. *Lawrence v. Davis*, 3 McLean, 178; *Pierson v. Manning*, 2 Mich. 445, 462.

An assignee should accept at once. Where, under a voluntary assignment, the assignee hesitated six hours, although the deed had been placed in his hands, and then accepted, but before his acceptance the property was levied upon by virtue of executions against the assignors, it was held that the judgment creditors had obtained a lien upon the goods, and were entitled

to have their debts satisfied in preference to the debts of the creditors provided for by the assignment. *Crosby v. Hillyer*, 24 Wend. 280.

The date of the instrument is only presumptive evidence of the time of its actual execution, and whenever fraud or mistake is alleged, this presumption may be contradicted by parol evidence. *Beck v. Cole*, 4 Sandf. 79. Taking possession of property under an assignment before the actual receipt of the instrument, may amount to an acceptance. *Metcalf v. Van Brunt*, 37 Barb. 621.

Where the assignment is made to several assignees, and some do not accept, the assignment is operative as to the assenting trustees only. The whole estate vests in them, and they act in the same manner as if the other assignees had not been named. *King v. Donnelly*, 5 Paige, 46; *Matter of Stevenson*, 3 Paige, 420; *Moir v. Brown*, 14 Barb. 39.

If all of the assignees named should refuse to accept in analogy to the well-established principles of common law, the trust created for creditors would not be permitted to fail for want of a trustee, but it would devolve upon a court of equity, who would direct the appointment of a new trustee in the place of those who had refused to act. *De Peyster v. Clendenning*, 8 Paige, 295; *King v. Donnelly*, 5 Id. 46.

But whether the provision of the statute requiring an acceptance in writing by the assignee is a condition precedent to the creation of the trust, is a question which has not arisen, but which, under decisions holding that this section of the statute is mandatory, would seem to require an answer in the affirmative.

§ 163. *Acknowledgment*.—The section of the statute cited (*ante*, § 151), requires that the assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds. The assent of the assignee, whether embraced in the assignment or separate from it, must also be acknowledged. These provisions in reference to the acknowledgment of the assignment are mandatory, and cannot be dispensed with. An assignment which is not acknowledged or proved according to the statute is void. *Hardman v. Bowen*, 39 N. Y. 196; s. c. 5

Abb. Pr. N. S. 332; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; rev'g s. c. 14 Abb. Pr. 121; *Britton v. Lorenz*, 45 N. Y. 51. Even though the assignment be in writing, and be delivered together with the possession of the assigned property, creditors of the assignor may attach the property in the hands of the assignee prior to the making of the statutory acknowledgment. *Hardman v. Bowen*, *supra*.

The act applies equally to instruments which are in effect general assignments, although they may not be in the form in which such instruments are usually drawn. Thus, a bill of sale absolute in form was held to be insufficient to convey the title to property, because, in law, it amounted to a general assignment and was unacknowledged. *Britton v. Lorenz*, 45 N. Y. 51.

An acknowledgment before an officer who had no previous knowledge of the parties, and who received no more evidence of their identity at the time of execution, is fatally defective, and the defect renders the instrument null and void. *Treadwell v. Sackett*, 50 Barb. 440; *Jones v. Bach*, 48 Barb. 568.

It has been held by the general term of the Common Pleas, in the case of *Adams v. Houghton* (3 Abb. Pr. N. S. 46, Cardozo, J., dissenting), that the assignment must be executed by the debtors in person, and not by their attorney; and, in *Cook v. Kelly* (12 Abb. Pr. 35, aff'd 14 Id. 466), it was held by the same court that the assignment could not be proved through the medium of a subscribing witness.

The general term of the Supreme Court, in the first department, decided, in the case of *Lowenstein v. Flaurand* (18 Supm. Ct. [11 Hun], 399), that an acknowledgment by an attorney in fact was sufficient. In delivering the opinion of the court, Mr. Justice Davis says: "The statute does not say, in express terms, that the assignment shall in all cases be acknowledged by the assignor himself, but simply that it be duly acknowledged before an officer authorized to take acknowledgments of deeds; and it is an established principle of law, that where power to execute a deed or other instrument is conferred upon an attorney in fact, by an instrument duly acknowledged, such an attorney may perform every act requisite to make the instrument valid and effective for the purpose for which it is made. We fail to

see any good reason for saying that the instrument in this case was not duly acknowledged within the meaning of the act of 1860." To the same effect is *Baldwin v. Tynes* (19 Abb. Pr. 32).

When the assignment is made by several assignors, it must be acknowledged by all. *Treadwell v. Sackett*, 50 Barb. 440; *Cook v. Kelly*, 12 Abb. Pr. 35; aff'd 14 Id. 466.

But this requirement does not necessarily extend to non-resident members of a partnership. Thus, where an assignment was executed and acknowledged by the resident partner in a limited partnership, both for himself and as attorney in fact for the non-resident partners, who ratified his act, it was held to be a sufficient compliance with the statute. *Darrow v. Bruff*, 36 How. Pr. 479.

And where one partner has absconded and surrendered his interest in the firm property, the assignment may be executed and acknowledged by the remaining partner. *Welies v. Marsh*, 30 N. Y. 344; *Nat. Bank v. Sackett*, 2 Abb. Pr. N. S. 286.

An assignee claiming under an assignment cannot defend himself on the ground that the assignment was invalid for want of an acknowledgment. *Randall v. Dusenbury*, 39 Supr. Ct. (7 J. & S.) 174.

§ 164. *Recording the assignment.*—The statute likewise provides (*ante*, § 151), that the assignment shall be recorded in the county clerk's office of the county where the debtor resided or carried on business at the date thereof. An assignment by co-partners is to be recorded in the county where the principal place of business of such co-partners is situated. Where real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of the assignment is to be filed and recorded in the county where such property is situated.

The record of the assignment in the county clerk's office is ~~not~~ constructive notice of the conveyance of real estate. Hence, where property previously mortgaged was assigned for the benefit of creditors, and the conveyance was not recorded in the register's office, and the property was subsequently foreclosed without making the assignee a party, it was held that the pur-

chaser on the foreclosure acquired a good title as against the assignee. *Simon v. Kaliske*, 6 Abb. Pr. N. S. 224.

The assignment, therefore, when it includes real estate, should be recorded in the office of the register of the county in which the property is situated.

An assignment by a non-resident should be recorded in the county where the assigned property is situated. *Scott v. Guthrie*, 10 Bosw. 408.

A mere neglect to record an assignment does not of itself furnish sufficient evidence of a fraudulent intent on the part of the assignor. *Denzer v. Mundy*, 5 Robt. 636.

§ 165. *When the assignment takes effect.*—The assignment having been reduced to writing, and acknowledged before an officer authorized to take the acknowledgment of deeds, and the acknowledgment having been indorsed on the instrument, a delivery of the instrument to the assignee, and its acceptance by him, will vest in him at once a title to the property covered by the assignment. The intention to deliver, on the one hand, and to accept on the other, is necessary to give effect to the instrument. *Brackett v. Barney*, 28 N. Y. 333. Thus, where the assignment was placed in the hands of the assignee, who hesitated to accept for six hours, and then claimed the property, but before he concluded to accept, the property was levied upon by virtue of executions against the assignors, it was held that the judgment creditors had obtained a lien upon the goods and were entitled to have their debts satisfied in preference to the debts of the creditors provided for by the assignment. *Crosby v. Hillyer*, 24 Wend. 280.

Delivery is essential to the validity of the conveyance, and it is always competent to show by parol that there has or has not been a delivery. *Stephens v. R. R. Co.* 20 Barb. 332; *Brackett v. Barney*, 28 N. Y. 333.

When an instrument is delivered to the clerk for record, and is recorded, the presumption is that it was duly delivered to the grantee; but this presumption is merely *prima facie*, and may be rebutted by parol or other evidence, and shown to have been never delivered. *Wilsey v. Dennis*, 44 Barb. 354; *Van Valen v. Schermerhorn*, 22 How. Pr. 416; *Rathbun v. Rathbun*, 6 Barb. 98.

CHAPTER XI.

THE ASSIGNED PROPERTY.

§ 166. *General assignments.*—General assignments are such as purport to convey *all* of a debtor's property in trust for the payment of all his debts as distinguished from assignments of a part only of the debtor's property, or of the property assigned for the benefit of a part only of his creditors. The general assignment act of 187~~2~~⁷, following the act of 1860 (see *post*, chapter XIX), requires that at the date of the assignment, or within twenty days thereafter, the assignor should make under oath and delivery to the county judge, a full and true inventory of all his estate at the date of the assignment. This inventory is properly to be regarded as part of the assignment. *Terry v. Butler*, 43 Barb. 395. Whether the necessary result of this legislation is, that whenever an assignment is made by a debtor in trust for his creditors, it must cover all his property at the date of the assignment, or that it will otherwise be invalid, has never been judicially determined. Previous to the statute, as we shall find in the following section, some uncertainty seemed to exist as to the right of a debtor to make a partial assignment of his property.

1 § 167. *Assignment of a part of the debtor's property.*—Previous to the enactments to which reference has just been made, it appears to have been the opinion of many able judges, that an assignment of a part only of the debtor's property in trust for his creditors, especially when preference were given, would not be sustained. Thus, in *McClelland v. Remsen* (14 Abb. Pr. 331, 334; *affi'd* 3 Abb. Dec. 74), Mr. Justice Brown says: "Assignments of property upon trust to pay debts, giving preferences have never been favored by the courts, and will only be upheld when they fulfill the conditions which the law finds it necessary to prescribe for the prevention of fraud. Among these, are that the debtor shall devote all his property

to the satisfaction of his debts without condition or qualification, and that he shall reserve nothing from the assigned property to himself, until all his creditors are paid." In that case, the instrument in question was executed after the passage of the act of 1860. The transaction was sustained on the ground that it was in substance a mortgage. In the case of *Oliver Lees & Co.'s Bank v. Talcott* (19 N. Y. 146, 148), Mr. Justice Grover says: "The debtor must devote all his property absolutely to the payment of his debts." In that case, however, the question was whether a provision requiring a creditor to surrender certain notes as a condition of payment under the assignment was valid. So, in *Rathbun v. Platner* (18 Barb. 272, 275), Mr. Justice Mason remarked, that assignments preferring creditors were only tolerated when honestly made for the purpose of giving the preference, "and devoting the whole property of the debtor to the payment of the debts." And in *Burdick v. Post* (12 Barb. 168, 175), Mr. Justice Barculo employed even stronger language. He said: "As we understand the settled law of this State, derived from an examination of all the decisions, assignments preferring certain creditors are only tolerated when they are absolute and unconditional; when they devote the whole of the assignor's property to the immediate and unqualified payment of his debts *pari passu*, or in a specified order." In that case the assignment was general, and was held void, because conferring on the assignee the power to sell on credit.

In *Goodrich v. Downs* (6 Hill, 438), which was an assignment of "nearly all" the debtor's property for the payment of four creditors, with a reservation of the surplus to the assignor, it was held that the assignment was fraudulent and void. Mr. Justice Bronson, who delivered the opinion of the court, remarking that "such transfers have only been allowed to stand when the debtor makes an unconditional surrender of his effects for the benefit of those to whom they rightfully belong." (See this case criticised in *Wilson v. Forsyth*, 24 Barb. 105, 123.)

And to the same effect, are remarks of the same judge in *Barney v. Griffin*, 2 N. Y. 365, 371.

On the contrary, after a very exhaustive review of the authorities in *Wilson v. Forsyth* (24 Barb. 105), Mr. Justice

Gould reached the conclusion that an assignment, although it gave preferences, and did not assign all the debtor's property, would not be for that reason, void. So, in *Wakeman v. Grover* (11 Wend. 187, 195), Mr. Justice Sutherland says, that the right to make assignments with preference, either partial or general, was thoroughly incorporated into our system. So, in *Doremus v. Lewis* (8 Barb. 124), where the assignment was of a portion of the debtor's property for the payment of a portion of his creditors without any reservation of the surplus, the assignment was sustained, and to the same effect in *Spies v. Joel*, 1 Duer, 669; see *Powers v. Graydon*, 10 Bosw. 630, 645.

§ 168. *Assignments for the benefit of a part of the creditors.*—Where the assignment is of all the debtor's property to a trustee in trust for the payment of a portion of his creditors, and then, without making any provision for other creditors, with a reservation of the surplus to the assignor, the assignment is unquestionably fraudulent and void. *Barney v. Griffin*, 2 N. Y. 365; *Strong v. Skinner*, 4 Barb. 546; *Leitch v. Hollister*, 4 N. Y. 211; *Goodrich v. Downs*, 6 Hill, 438. But when the assignment contains no express reservation of the surplus for the use of the assignor, it will not be void, although it provide for a part only of the creditors. *Bishop v. Halsey*, 3 Abb. Pr. 400, Bosworth, J.; *Doremus v. Lewis*, 8 Barb. 124; *Spies v. Joel*, 1 Duer, 669. It is important in this connection to bear in mind the distinction between a conveyance of property to a trust for the payment of debts, and a conveyance directly to a creditor as security for a debt. The former places the whole legal and equitable title to the assigned property beyond the control of the debtor, and beyond the reach of his creditors by legal process. *Briggs v. Davis*, 21 N. Y. 576; s. c. 20 N. Y. 15; *Wilkes v. Ferris*, 5 Johns. 335. If, therefore, it conveys all the debtor's property, and there are creditors not provided for in the assignment, they are debarred from all legal or equitable recourse against the debtor's property until after a settlement of the trust. They are therefore manifestly hindered and delayed. *Barney v. Griffin*, 2 N. Y. 365; *Strong v. Skinner*, 4 Barb. 546; *Leitch v. Hollister*, 4 N. Y.

211; *McClelland v. Remsen*, 14 Abb. Pr. 331; affi'd 3 Abb. Dec. 74.

But when the conveyance is to creditors themselves by way of security only, the control of the property still remains in the debtor subject to the lien created; he has an equity of redemption which he may sell or incumber, and which creditors may reach by process of law. *Leitch v. Hollister*, 4 N. Y. 211; *Van Buskirk v. Warren*, 4 Abb. Dec. 457; *McClelland v. Remsen*, 3 Id. 74; *Dunham v. Whitehead*, 21 N. Y. 131.

§ 169. *What may be assigned.*—It is not necessary to state in detail the various descriptions of property which are capable of assignment. It is enough to say that the assignee may be clothed with the title to every species of property which is capable of transfer, if the language of the assignment is sufficiently extensive. It has been stated as a general rule, that any interest to which the personal representatives of a deceased person could succeed, is the subject of assignment *inter vivos*. *Zabriskie v. Smith*, 13 N. Y. 322, 335, Denio, J.; see *Hyslop v. Randall*, 4 Duer, 660, 663; *Johnston v. Bennett*, 5 Abb. Pr. N. S. 331.

Thus, rights of action for personal torts which die with the person are not assignable. *Brooks v. Hanford*, 15 Abb. Pr. 342; *Hodgman v. Western R. R. Co.* 7 How. Pr. 492; *People v. Tioga Com. Pleas*, 19 Wend. 73. As damages for an assault and battery. *Pulver v. Harris*, 52 N. Y. 73; affi'g 62 Barb. 500.

But a right of action for the wrongful taking and conversion of personal property is assignable; and under the provisions of the Code, the assignee can recover upon the same in his own name.

Hence, an assignment by a person of all his property and estate, transfers a right of action existing in his favor for such conversion. *McKee v. Judd*, 12 N. Y. 622; *Sherman v. Elder*, 24 N. Y. 381; *Richtmeyer v. Remsen*, 38 N. Y. 206.

So a right of action for the conversion of promissory notes will pass under a general assignment. *Whittaker v. Merrill*, 30 Barb. 389.

The right to recover against the plaintiff in a replevin suit,

the value of the property which has been delivered to him on the writ of replevin, together with damages for its seizure, is a *claim* against such plaintiff, and will pass under a general assignment made of all dues and claims, by the defendant in such suit. *Jackson v. Losee*, 4 Sandf. Ch. 381.

A right of action against a common carrier to recover the value of property intrusted to him, is assignable, and the assignee may sue in his own name. *Merrill v. Grinnell*, 30 N. Y. 594; *McKee v. Judd*, 12 N. Y. 622; and *Waldron v. Willard*, 17 N. Y. 466.

Where the assignment is general, and includes all the assignor's estate, in the absence of fraud, the assignee, except as stated in the following section, takes only such rights and interests as the debtor himself had or could assert at the time of making the assignment. He is subject to all the equities which the assignor himself would be subject to. *Van Heusen v. Radcliff*, 17 N. Y. 580; *Warren v. Fenn*, 28 Barb. 333; *Maas v. Goodman*, 2 Hilt. 275; *Reed v. Sands*, 37 Barb. 185; *Addison v. Buckmyer*, 4 Sandf. Ch. 498.

As to construction of the language of the transfer (see *ante*, ch. X).

§ 170. *Property fraudulently transferred*.—In one instance only, does the assignee acquire the right to set up a claim which the assignor himself could not maintain. It is provided by statute, "that any executor, administrator, receiver, assignee, or other trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by, or of right belonging to any such trustee or estate." Laws of 1858, ch. 314; 3 R. S. 6th ed. 146, § 1.

By another section it is also provided: "That every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with the estate, property or effects of any deceased person

or insolvent corporation, association, partnership or individual, shall be liable on the proper action to the executors, administrators, receivers, or other trustees of such estate or property, for the same or the value of any property or effects so received or taken, and for all damages caused by such acts, or to any such trust estate." Laws of 1858, ch. 314, § 2; 3 R. S. 6th ed. 146, § 2.

Previous to this enactment Chan. Kent, in *Bayard v. Hoffman* (4 Johns. Ch. 450), sustained a suit by the voluntary assignees of an insolvent debtor to reach property which had been previously disposed of by the assignors in fraud of the rights of creditors, but this case was disapproved by Chan. Walworth, in *Brownell v. Curtis* (10 Paige, 210, 218).

And in accordance with the doctrine of the last case, it was held that where an insolvent debtor, on the eve of making a general assignment, transferred in trust for the benefit of certain of his creditors, a bond and mortgage which were not payable until about four years thereafter, and the transfer contained a proviso that the assignee should retain the bond and mortgage until the expiration of the period it had to mature, and should not part with it, nor attempt to collect the principal until that time, that the transfer was fraudulent as against creditors, and that being valid against the assignor, it did not pass by his general assignment made a few days subsequently. *Storm v. Davenport*, 1 Sandf. Ch. 135; see also *Leach v. Kelsey*, 7 Barb. 466. A distinction is to be observed between a conveyance by the debtor fraudulent as to creditors, because made with the intent to hinder, delay and defraud them, and a conveyance obtained from the debtor by fraud and trick. In the former case, the conveyance is good as against the assignor, and apart from the statute his assignee can obtain no better title than the assignor himself has (see *post*, ch. XIV), but in the latter case the imposition and fraud would have furnished a ground for the assignor himself to apply to a court of equity for relief, and this right follows the property into the hands of an assignee for creditors.

The case of *McMahon v. Allen* (35 N. Y. 403; more fully, 32 How. Pr. 313; rev'g 34 Barb. 56; 12 Abb. Pr. 275), is an extremely instructive and interesting case in this connection.

In that case a transfer of property, real and personal, was obtained fraudulently and inequitably, by false representations made by the transferee to the transferer, by abuse of a fiduciary relationship and by practice upon a reckless and improvident sailor. The transferer subsequently made a conveyance of all his property and causes of action to an assignee for the benefit of his creditors. The question was whether the assignee could maintain an action to set aside the previous conveyance as having been fraudulently and inequitably obtained, and by an abuse of a fiduciary relationship. The Court of Appeals were unanimously of opinion that the action could be maintained. The conveyances in that case were made previous to the act of 1858. And the decision was placed upon the ground not of fraud against creditors, but of imposition and fraud upon the assignor. The cases relied upon were *Dickinson v. Burrill*, L. R. 1 Eq. 337; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Tracy v. Talmage*, 14 N. Y. 192; *Waldron v. Willard*, 17 N. Y. 466.

Under the act of 1858, the assignee has ample power, and no doubt it is his duty to attack any conveyance made in fraud of creditors, and to reach the property fraudulently disposed of or concealed. *Miller v. Halsey*, 4 Abb. N. S. 28, 33.

§ 171. *Property held in trust.*—Property held in trust by the debtor does not pass to his assignee under the assignment, and if the property consists of goods remaining in specie or of notes and other choses in action, the *cestui que trust* is entitled to the property and not the creditors at large. The only check to the operation of this rule is when the property is converted into cash by the insolvent, and has been absorbed in the general mass of the estate, so that it cannot be followed or distinguished. *Kip v. Bank of New York*, 10 Johns. 63. See *Andrew v. N. Y. Bible & Prayer Book Society*, 4 Sand. 156.

§ 172. *Property transferred by previous assignment.*—The assignment of a chose in action will prevent its passing to assignees in virtue of a subsequent general assignment by the same assignor under the bankrupt or insolvent acts; and this without notice to the debtor or subsequent assignees. *Muir v. Schenck*, 3 Hill, 228.

So a claim transferred by a previous general assignment for the benefit of creditors will not pass to a trustee to whom an assignment is subsequently made under the insolvent act. *Hopkins v. Banks*, 7 Cow. 650.

Where a debtor, residing in Pennsylvania, to whom a mortgage upon land in this State, delivered the mortgage over, so as to pass the equitable interest in it to another, and then executed an assignment under the insolvent laws of Pennsylvania, it was determined that no interest in the mortgage passed to the assignee under that assignment. *Hosford v. Nichols*, 1 Paige, 220.

§ 173. *Money in bank*.—A general assignment of all a debtor's property passes a deposit to his credit in a bank, and carries to the assignee all the right which the depositor had in the deposit at the date of the assignment; and the bank has no lien in such a case upon the deposit for the amount of a bill of exchange indorsed by the depositor and discounted by the bank, but which bill has not yet matured. *Beckwith v. Union Bank*, 9 N. Y. 211; aff'd 4 Sandf. 604.

§ 174. *Property in transit*.—An assignment of all the debtor's "goods and chattels, wares and merchandize, rights, credits, notes, accounts, and demands," does not pass his interest in a sum of money borrowed by him, and then in course of transmission to him from the lender. *Sheldon v. Dodge*, 4 Den. 217.

But where the assignee had ordered certain goods to be manufactured by him in England, previous to executing the assignment, and the goods arrived here subsequent to the assignment, it was held that the assignee had his election to accept the goods and pay the contract price, or to refuse to accept them; and having accepted them, his title was good against a levy made by the sheriff on an execution against the assignor. *Van Dine v. Willett*, 38 Barb. 319.

Property in transit which is subject to the vendor's right of stoppage *in transitu*, passes to the assignee, subject to the same rights which the vendor would have against the assignee, inas-

much as the voluntary assignee is not to be regarded as a *bona fide* purchaser for value.

§ 175. *Real property*.—Where land is to be conveyed, the assignment should be executed with the formalities of a deed of conveyance; it should be under seal and should be recorded as a conveyance, otherwise it will not be notice to subsequent purchasers and incumbrances. *Simon v. Kaliske*, 6 Abb. Pr. N. S. 224; s. c. 37 How. Pr. 249.

Land passes by a general assignment under the insolvent act, and a creditor whose judgment against the insolvent is perfected after the assignment, has no lien, and therefore cannot redeem within the act. *Marsh v Wendover*, 3 Cow. 69.

A general assignment which conveys all real estate of the grantor in a specified town, and all leases and reservations and rents thereof issuing therefrom, together with all debts due for rents of land in said town, passes to the assignee the covenants, conditions, or right of entry contained in a lease in fee. *Main v. Green*, 32 Barb. 448.

§ 176. *Wife's dower and separate property*.—Unless the wife voluntarily relinquishes her right of dower in real estate assigned by her husband, the assignee will take the land, subject to that right (*Dimon v. Delmonico*, 35 Barb. 554), and she will be entitled to her dower in any surplus which may come into the hands of the assignee after foreclosure. (*Mathews v. Duryea*, 3 Abb. Dec. 220; s. c. 4 Keyes, 525; affi'g 45 Barb. 73; s. c. 17 Abb. Pr. 256. When the wife intends to convey her right of dower, it may be done by deeds of conveyance ancillary to the assignment executed by her husband and herself. *Darling v. Rogers*, 22 Wend. 483.

Previous to the married woman's acts, an assignment by the husband under the insolvent act vested ⁱⁿ the assignee the personal estate ~~in an action~~ of the wife, unless the same was secured to her as her separate property. But the assignee took the legal interest in the same, subject to the wife's right of survivorship, if the husband died before the assignee has reduced such property to possession. The assignee also took the assignment of the wife's estate in action, subject to her equitable

claim thereon, for the support of herself and her infant children, if she had no other sufficient means for that purpose, provided such claim was asserted by the wife, or there is a suit instituted in this court for the recovery of such property before the assignee has reduced it to possession. *Van Epps v. Van Dusen*, 4 Paige, 63, 74.

§ 177 *Interests of devisees*.—A devisee of real estate, who was also the recipient of personal property under the will, which was charged with the payment of debts, assigned “all his share and claim in and to the personal estate of the testator, and in and to all moneys which then were or thereafter might come into the hands of the executors, arising from any property or estate of the testator.” Previous to the assignment the executors sold a portion of the real estate devised, under a surrogate’s order, for the payment of debts, by reason of a deficiency of personal estate. The executors discovered and received other assets after the assignment. *Held*, that the equitable right of such devisee to be indemnified for the sale of his real estate out of assets and moneys subsequently discovered and received by the executors, passed to the assignee, although not specially mentioned in the assignment, and although it did not appear that the assignor knew of the fund in question. *Couch v. Delaplaine*, 2 N. Y. 397.

§ 178. *Leasehold property*.—The question whether leasehold property passes under the assignment to the assignee, is one of importance to the assignee, for if he become the assignee of the lease, he will be bound by all its covenants and conditions, and will therefore become liable for the payment of the rent. The liability of an assignee for rent will be considered in its appropriate place. The inquiry at present is under what circumstances the leasehold property passes to him. It seems to be now definitely settled that assignees under a general assignment like assignees in bankruptcy are not bound to accept property which is not valuable to the estate, and that consequently they have an election whether to accept leasehold property burdened with the payment of the rent, or to reject it. *Copeland v. Stephens*, 1 Barn. & Ald. 594; *Carter v. Warne*,

4 Car. & Pay. 191; *Pratt v. Leaven*, 1 Miles (Penn.) 358; *Journeay v. Brackley*, 1 Hilt. 447; *Stinemets v. Ainslie*, 4 Den. 573; *Martin v. Black*, 9 Paige, 641.

If the conveyance of the debtor's property is in general terms without any special designation of the lease, the lease will be deemed property passing under the assignment or not at the election of the assignee until he enters under it, or by some other act or omission to act, determines his right to elect. *Carter v. Hammett*, 12 Barb. 253, 263; *Bagley v. Freeman*, 1 Hilt. 197; *Dennistown v. Hubbell*, 10 Bosw. 155; *Jones v. Hausmann*, Id. 168; *Lewis v. Burr*, 8 Id. 140.

But it seems that if the lease is specifically mentioned in the assignment, or there are apt words of conveyance of leasehold property, and the assignee knows of the existence of the lease, the acceptance of the assignment will amount presumptively to an acceptance of the lease. *Astor v. Lent*, 6 Bosw. 612; *Young v. Peyser*, 3 Bosw. 308; *Bagley v. Freeman*, 1 Hilt. 196; see *Morton v. Pinckney*, 8 Bosw. 135.

A conveyance of all other real and personal property and estate, whatever and wherever situate, and all interest therein is sufficiently comprehensive to include the interest of the assignee of a lease equitably assigned. *Astor v. Lent*, 6 Bosw. 612.

§ 179. *Exemptions*.—The debtor may lawfully except from the operation of the assignment, property which is by law exempt from levy and sale under execution. *Don v. Platner*, 16 N. Y. 562; *Dolson v. Kerr*, 12 Supm. Ct. R. (5 Hun), 643; *Heckman v. Meisenger*, 49 Penn. St. 465; *Baldwin v. Peet*, 22 Tex. 708; *Garnor v. Frederick*, 18 Ind. 507; *Smith v. Mitchell*, 12 Mich. 180; *Farquharson v. McDonald*, 2 Heisk. (Tenn.) 404. And in the earlier cases in this State, it was at one time held that the reservation of a sum of money to be paid to the assignors for their maintenance, would be sustained. *Murray v. Riggs*, 15 Johns. 571; s. c. 2 Johns. Ch. 565; *Austin v. Bell*, 20 Johns. 442. But this doctrine has been distinctly and emphatically overruled. *Goodrich v. Downs*, 6 Hill, 438, 440; *Grover v. Wakeman*, 11 Wend. 187; *Butler v. Van Wyck*, 1 Hill, 463; *Mackie v. Cairns*, 5 Cow. 584.

And it is now the settled law of this State, that the property covered by the assignment must be unreservedly applied to the benefit of creditors. *Mackie v. Cairns*, 5 Cow. 584; *Currie v. Hart*, 2 Sandf. Ch. 353.

But it does not necessarily follow that all the debtor's property must be included in the assignment, if the property not included is left open to creditors. Thus, an assignment which expressly excepted a claim then in suit, was held not to create a reservation for the ease, advantage or benefit of the assignor. *Carpenter v. Underwood*, 19 N. Y. 520.

If a debtor in failing circumstances makes an assignment of his property for the benefit of a part of his creditors only, and the value of the property assigned is more than parties could have supposed necessary to satisfy the claims of those creditors, fraud may be inferred from that circumstance alone, unless a satisfactory excuse is shown for the transfer of the excess. Chan. Walworth, in *Beck v. Burdett*, 1 Paige, 305, 309; see *Butler v. Stoddard*, 7 Paige, 163.

CHAPTER XII.

PREFERENCES.

§ 180. *In general*.—It cannot be doubted that, in the absence of a bankrupt law or some statutory inhibition, a debtor while he is administering his own affairs may honestly prefer the payment of one debt to another. He may indeed apply all his property to the payment of one debt, if the debt be one for which he is justly liable, and the property be no more than sufficient to pay it without the imputation of fraud. *Archer v. O'Brien*, 14 Supm. Ct. (7 Hun), 146; *Auburn Ex. Bank v. Fitch*, 48 Barb. 344; *Carpenter v. Muren*, 42 Id. 300; *Leavitt v. Blatchford*, 17 N. Y. 521; *Woodworth v. Sweet*, 51 N. Y. 8; *Hall v. Arnold*, 15 Barb. 599, 600; *Waterbury v. Sturtevant*, 18 Wend. 353; *Hill v. Northrup*, 9 How. Pr. 524; *Williams v. Brown*, 4 Johns. Ch. 682. The law on this subject is forcibly expressed by Mr. Justice E. Darwin Smith, in the following language: "A man may at all times convey or turn out his property in payment of his just debts; and this is none the less true because he is straightened in his circumstances and unable to pay all his creditors. At such times he may honestly prefer one creditor to another, and if he sells and conveys his property for a fair price in payment of his just debts, no one can question the legality of the conveyance or transfer. There is, there can be, no fraud in such a transaction. Fraud cannot be predicated upon it, on the assumption that the debtor meant to defraud his creditors. There is no fraud in the case, if the property in fact goes to pay and satisfy an honest debt." E. D. Smith, J., in *Auburn Exchange Bank v. Fitch*, 48 Barb. 344, 353; see *Laidlaw v. Gilmore*, 47 How. Pr. 67.

And where the conveyance is directly to a creditor in consideration of a previous valid indebtedness, it is not repugnant to the statute of frauds as being a voluntary conveyance. It is not necessary that the creditors should show any new consideration for the obvious reason that his equity, at the time of the transfer, was the same as that of all other creditors, and he is

entitled to the benefit of the universal rule, that when the equities are equal the legal title will prevail. *Seymour v. Wilson*, 19 N. Y. 417, 421; *Archer v. O'Brien*, 14 Supm. Ct. (7 Hun), 146; see *Townsley v. McDonald*, 32 Barb. 604.

And the transfer will be sustained although the debtor designed and intended to prevent some other creditor from taking the property. *Hall v. Arnold*, 15 Barb. 599.

Nor is the payment or transfer any the less valid because the creditor is acquainted with the insolvent condition of the debtor. Indeed, it has been said that "the creditor, when he discovers circumstances which would put a prudent man on inquiry, should, in the preservation of his own rights, seek the payment of his debt, the protection of his property. Such a course is not only consistent with honesty, but is a duty which he owes to himself, the observation of which is sanctioned by the rules of law authorizing the preference which he obtains." Mr. Justice Brady, in *Archer v. O'Brien*, 14 Supm. Ct. (7 Hun), 146, 149; *Hale v. Stewart*, 14 Supm. Ct. (7 Hun), 591.

So a debtor, after a verdict against him, and previous to the entry of a judgment thereon, may lawfully give a preference to a creditor, by conveying to him real estate in satisfaction of a *bona fide* debt, and thus prevent the attachment of a lien upon the real estate, by virtue of a judgment entered upon the verdict. *Waterbury v. Sturtevant*, 18 Wend. 353; and see *Wilder v. Winne*, 6 Cow. 284; *aff'd* 4 Wend. 100. This has been the law ever since the leading case of *Holbird v. Anderson* (5 T. R. 235). *Weller v. Wayland*, 17 Johns. 102; *Jackson v. Brownell*, 3 Cai. 222.

§ 181. *Preferences in general assignments.*—Creditors acquire no legal rights in the debtor's property merely from the fact of his insolvency, and the debtor therefor, after as well as before he becomes insolvent, may make any disposition of his property which does not interfere with the existing rights of others. *Mayer v. Hillman*, 91 U. S. (1 Otto), 496. It is an exercise of this absolute dominion, which a person has over his own property, which has established the rule at common law, that a debtor may assign his property to a trustee in payment of preferred creditors.

"The true reason," says Senator Tracy, in *Grover v. Wakeman* (11 Wend. 187), "why this right of preference has been allowed to the debtor, is that whilst the property is in his hands, unshackled of legal liens and incumbrances, his power over it is absolute, and as he can dispose of it by sale to any person, so he may dispose of it by way of satisfaction to any creditor."

This right is unrestrained by statute in this State, except in the special instances which will be referred to, and the cases in which it has been decided, that a debtor in failing circumstances has a right to prefer one of his creditors to another in the distribution of his estate, are very numerous. *McMenomy v. Roosevelt*, 3 Johns. Ch. 446; *Murray v. Riggs*, 15 Johns. 571; *Wilkes v. Ferris*, 5 Johns. 335; *Mackie v. Cairns*, 5 Cow. 547; aff'g *Hopk. Ch. 372*; *Wilder v. Winne*, 6 Cow. 284; *Wentringham v. Lafoy*, 7 Cow. 735; *Hendricks v. Robinson*, 17 Johns. 438; *Hyslop v. Clarke*, 14 Id. 458; *Grover v. Wakeman*, 11 Wend. 187; *Webb v. Daggett*, 2 Barb. 9; *Bingham v. Tillinghast*, 15 Id. 618; *O'Neil v. Salmon*, 25 How. Pr. 246; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Jones*, 37 Id. 608; *Grant v. Chapman*, 38 Id. 293; *Putnam v. Hubbell*, 42 Id. 106; *Jaycox v. Caldwell*, 51 Id. 395; *Dana v. Owen*, 54 Id. 646; *Rathbun v. Platner*, 18 Barb. 272; *Stern v. Fisher*, 32 Id. 198; *Keteltas v. Wilson*, 36 Id. 298.

In many of the States preferential assignments are prohibited by statute, but in none has the rule at common law, as above stated, been denied. Burrill on Assgts. 3d ed. ch. X.

§ 182. *The right to prefer not favorably regarded.*—Although the right to prefer is sustained by such overwhelming weight of authority, yet the law simply tolerates assignments giving preferences, it does not favor them. Vice-Chan. Sandford, in *Mead v. Phillips*, 1 Sandf. Ch. 83; *Rathbun v. Platner*, 18 Barb. 272. And it appears to be the settled doctrine of the courts of this State, not to sanction the extension of the principles beyond what must be considered the settled law of the land. See *Wilson v. Ferguson*, 10 How. Pr. 175.

"The principle of allowing an insolvent debtor to give, arbitrarily, such preferences, among creditors equally worthy, as

may result in the payment of the entire debt of, and the loss of the entire debt of another, has been condemned in the strongest terms by many of the wisest statesmen and the most enlightened jurists of our country. Hence it is that most, if not all the laws which are passed for the relief of insolvent debtors, are found denying their advantages to such debtors as have, in the disposition of their property, given preferences among their creditors." Harris, J., in *Webb v. Daggett*, 2 Barb. 9.

While admitting the right to prefer the policy of permitting its exercise, has frequently been criticised and condemned. Thus Mr. Justice Duer, in *Nicholson v. Leavitt* (4 Sandf. 252, 282), uses the following emphatic language :

"The preference, which leaves to those who remain only a faint hope and doubtful chance of a miserable dividend, we condemn as a positive injustice, and lament that the law has denied to us the power of redressing the wrong. We know that the custom of giving such preferences has extensively prevailed, and is warranted in a measure by public opinion as well as by the decisions of our courts ; but we are not the less persuaded that it is forbidden by public policy, and is inconsistent with a sound morality. * * * * It is now the undoubted law of the State, and however serious may be the conviction of judges, that the allowance of the practice tends to injustice and tempts to fraud, the legislature alone is competent to apply the remedy. Until the existing law shall have been altered by the National or State Legislature, our jurisprudence must remain liable to the reproach that we are the only nation in the civilized world, in which a merchant, knowing or contemplating his insolvency, is allowed to place his whole property beyond the reach of the body of his creditors, by devoting its avails, principally or exclusively, to the satisfaction of the claims of a few. In every civilized country but our own, it is not only a truth in morals, but a rule in law, that the property of an insolvent debtor belongs to his creditors in the proportion of their debts, and that every disposition made by him, in contravention of their equal rights, is null and void."

And language of a similar character, although perhaps not equally severe, may be found in many of the reports of this State. See remarks of Mr. Justice Sutherland in *Grover v.*

Wakeman, 11 Wend. 187, 194; Chancellor Kent in *Riggs v. Murray*, 2 Johns. Ch. 565, 577; Mr. Justice Nelson in *Cunningham v. Freeborn*, 11 Wend. 240, 256; Mr. Justice Roosevelt in *Nichols v. McEwen*, 17 N. Y. 22; Chancellor Walworth in *Boardman v. Halliday*, 10 Paige, 223.

But a more favorable view of the system of preferences has sometimes been expressed. Thus Mr. Justice Porter, in *Townsend v. Stearns* (32 N. Y. 209, 213), says: "Some diversity of opinion exists and occasionally finds expression in the courts as to the policy of our laws in permitting a debtor by his own act to withdraw his property from the reach of ordinary process. It is true that it tends to the disadvantage of those not preferred; but it operates beneficially to the creditors as a class, by securing the application to the payment of debts of a large portion of the assets which would otherwise be exhausted by the costs incident to a race of legal diligence between the prosecuting creditors. It tends also to such delay, as may be needful in the execution of the trust; but this is common to all the creditors, and no more the subject of just complaint than the delay unavoidably incident to the extinguishment of claims against the estate of a deceased debtor."

§ 183. *What debts may be preferred.*—The assignor may lawfully prefer any legal debts and liabilities. He may prefer his wife for money loaned by her to him (*McCartney v. Welsh*, 44 Barb. 271; aff'd 51 N. Y. 626); even where the loans were all made previous to the act of 1848 (Laws of 1848, ch. 200). *Jaycox v. Caldwell*, 51 N. Y. 395; see *Woodworth v. Sweet*, Ibid. 8; *Kluender v. Lynch*, 2 Abb. Dec. 538. He may prefer claims not yet due. This does not tend to hinder or delay creditors, for the assignees may retain in their hands sufficient to meet such claims, and distribute the residue without delay. *Read v. Worthington*, 9 Bosw. 617. He may give a preference to a surety or indorser. *Hendricks v. Walden*, 17 Johns. 438; s. c. as *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Cunningham v. Freeborn*, 11 Wend. 241; *Keteltas v. Wilson*, 36 Barb. 298; s. c. 23 How. 69; *Lansing v. Woodworth*, 1 Sandf. Ch. 43. But he may not secure debts not in existence, or make provision for the payment of future advances. *Hendricks v. Robinson*, *supra*;

Barnum v. Hempstead, 7 Paige, 568. And he may give a preference to a person holding claims which he has purchased at a large discount. *Low v. Graydon*, 50 Barb. 414; *Powers v. Graydon*, 10 Bosw. 630.

If there is an attachment upon property which has not yet been decided by the court, an assignment preferring this attachment will not be void. The fact that the preference is conditional or contingent makes no difference, if unnecessary delay is not thereby caused. *Grant v. Chapman*, 38 N. Y. 293.

Debts which have been previously secured may be preferred, but the secured creditor will be held bound in equity to resort to their previous security first, so as to give the other creditors provided for the benefit of the assigned fund. *Dimon v. Delmonico*, 35 Barb. 554; *Besley v. Lawrence*, 11 Paige, 581.

§ 184. *There must be an absolute surrender of the property without conditions.*—It has been frequently declared that assignments giving preferences must devote the assigned property to the satisfaction of the debts, without condition or qualification; and that the debtor shall reserve nothing to himself until all the creditors are paid. Such assignments cannot be made the instrument of placing the assigned property beyond the reach of creditors, for the benefit, either immediate or remote, of the insolvent himself. *Grover v. Wakeman*, 11 Wend. 187; *Haydock v. Coope*, 53 N. Y. 68; *Goodrich v. Downs*, 6 Hill, 438; *Nichols v. McEwen*, 17 N. Y. 22; *McClelland v. Remsen*, 14 Abb. Pr. 331; *Rathbun v. Platner*, 18 Barb. 272. But this principle, although announced in cases in which preferential assignments have been made, is not exclusively applicable to such cases. And an assignment made for the equal benefit of all creditors is subject to the same rule.

The cases illustrative of the principle here referred to will be found more fully collected in another connection. See chap. XIV.

§ 185. *Preferences must be declared.*—As we have already had occasion to remark, the assignment must itself fix and determine the rights of the creditors in the assigned property. The assignor cannot reserve to himself the right to determine

the preferences to be given. To permit this would be to place the creditors in the power of the debtor, and compel them to acquiesce in such terms as the debtor may think proper to prescribe as the only condition upon which they are permitted to participate in his property. This would be a fraud upon the creditors, and necessarily delay and hinder them in the collection of their debts. *Averill v. Loucks*, 6 Barb. 470, 476; *Wakeman v. Grover*, 11 Wend. 203, 231; s. c. 4 Paige, 41; *Barnum v. Hempstead*, 7 Paige, 571; *Boardman v. Halliday*, 10 Id. 227; *Sheldon v. Dodge*, 4 Denio, 217; *Hyslop v. Clarke*, 14 Johns. 458, 462; *Kircheis v. Schloss*, 49 How. Pr. 284.

Where the assignee was authorized, after paying certain specified creditors, to apply the residue of the proceeds of the property to pay all the other debts of the assignor in such order of priority as the assignees should deem proper, and if the residue of the fund was not sufficient to pay all such debts in full, the assignees were to apply it to the payment of such and such parts of those debts as they should judge most just and equitable; this provision was held to render the assignment void. *Boardman v. Halliday*, 10 Paige, 223; *Barnum v. Hempstead*, 7 Paige, 568. The fact that the assigned property was not sufficient to pay the creditors whom the assignor had himself preferred was not deemed significant. The intent of the assignor at the time of making the assignment must control. *Boardman v. Halliday*, *supra*.

An application of the rule just stated will be found in the case of a preference upon a secret trust for the benefit of the assignor. Thus, where the assignor, acting in concert with his son, one of the assignees, but without the knowledge of the other assignees, simultaneously with the making of the assignment, procured from certain of the creditors to whom a preference was given under the assignment, agreements in writing to lend to his son, one of the assignees, a large portion of the money that they should receive upon their debts under the assignment, for the term of five years; such loan to be secured by the notes of the son, indorsed by the assignor, and authorizing the assignees to pay to this son the sums so agreed to be loaned, and take his receipt therefor; and the name of the son was used for the benefit of the assignor, and the agreement was

in fact made between the creditors and the assignor, to enable the latter to prosecute business in the name of the son, for his own benefit, and to use the money in such business; the assignment was deemed fraudulent and void. Mr. Justice Grover, in pronouncing the opinion in that case, made use of the following language: "To hold that a debtor may exercise his right of giving preferences among his creditors, so as to secure to himself the future control of the property assigned, or its proceeds, would give facilities for the grossest frauds, and utterly defeat the ends for which assignments have been sustained, which are the application of the property of insolvents to the payment of their debts. It would enable insolvent debtors to coerce creditors into almost any agreement which they desired. Under such a rule such a debtor could not only compel a release of the whole upon preferring a part of the debt, but would compel the creditors to leave the property in his hands, subject to his control, upon such terms as he should dictate." *Haydock v. Coope*, 53 N. Y. 68. Further illustrations of the rule here stated will be found *post*, chap. XIV.

§ 186. *Statutory limitations on the right to prefer.*—"The right to give preferences in cases of insolvency, or in contemplation of insolvency, has been expressly denied to corporations." 1 R. S. 591, § 9; 3 R. S. 6th ed. 298, § 9, cited at length, *ante*, § 142; and see cases there referred to. And also to limited partnerships. 2 R. S. 766, §§ 20, 21; 3 R. S. 6th ed. 156, cited at length, *ante*, § 147; and see the cases there referred to.

In addition to these express restrictions, the giving of a preference is a bar to a discharge under the two-third act. See *ante*, § 49.

A debtor who has been proceeded against under the act known as the Stilwell act (Laws of 1831, p. 400), cannot execute a general assignment so as to defeat the priority obtained by the debtor who instituted those proceedings. *Spear v. Wardell*, 1 N. Y. 144; *Hall v. Kellogg*, 12 N. Y. 325; *Wood v. Bolard*, 8 Paige, 556, 557.

CHAPTER XIII.

APPROPRIATION OF PROPERTY IN ASSIGNMENTS BY FIRMS AND THEIR MEMBERS.

§ 187. *When firm and individual property included.*—Assignments may be made by co-partners of the partnership property for the payment of their partnership debts, and by individuals of their interest in the co-partnership for the benefit of their creditors (*ante*, §§ 143, 144), but assignments are also frequently made in which firm and individual property is assigned for the payment of firm and individual debts.

An assignment made by co-partners reciting their co-partnership and their indebtedness as such, and purporting to convey all their property, will be deemed to assign only that which was the joint partnership property, and not any of their individual property. *Morrison v. Atwell*, 9 Bosw. 503, 510.

It is no objection to an assignment of joint or co-partnership property, that it does not include the individual property, or that it directs that the residue after payment of the co-partnership debts should be returned to the assignors without making provision for the payment of the individual debts of the partners. *Bogert v. Haight*, 9 Paige, 296, 301, 302; see *Collumb v. Caldwell*, 16 N. Y. 484; s. c. as *Collumb v. Read*, 24 N. Y. 505.

When the assignment does include both firm and individual property, the fund created by the disposition of the property is not an entire fund to be distributed indiscriminately, but the proceeds of the firm and individual property severally create several funds which are to be separately administered.

Thus, Mr. Justice Robertson, in *Scott v. Guthrie* (10 Bosw. 408, 426; s. c. 25 How. Pr. 512), in discussing the questions raised under such an assignment, says: "The order of equities of partnership and individual creditors in partnership funds, virtually divides them in two parts; one being so much as is necessary to pay the former, and the other the residue subject to

the equities between the partners for over contributions in paying debts, or over drafts of their shares of the profits. They are as distinct in their nature as two kinds of property, and although joined in an assignment of them, for different purposes, by one instrument, motives in regard to the disposition of one cannot thereby be made to operate on the disposition of the other, in regard to which no such or similar motive exists. The error arises from considering the property assigned entire, the creditors of the firm and individual partners as one body having equal rights, the instrument as one, and the purpose as to the whole, single."

"It is an established and a very just and reasonable doctrine," says Mr. Justice Duer, in *Nicholson v. Leavitt* (4 Sandf. 252, 299), "that when a partnership becomes insolvent, all its assets, using the term in its largest sense, must be applied exclusively in the first instance to the payment of the partnership debts, so as to confine the remedy of the separate creditors of each partner to the share of their debtor in the surplus that may remain after the debts of the firm have been satisfied."

§ 188. *Assignment of firm property providing for payment of individual debts.*—The appropriation by an insolvent firm, of partnership property to the payment of the separate debts of one partner, is fraudulent and void as against firm creditors. *Wilson v. Robertson*, 21 N. Y. 587; *Hurlbert v. Dean*, 2 Abb. Dec. 428; see also *Grover v. Wakeman*, 11 Wend. 187; *Jackson v. Cornell*, 1 Sandf. Ch. 348; *Egbert v. Woods*, 3 Paige, 517; *Cox v. Platt*, 32 Barb. 126; *Leslie v. Wallack*, 3 Rob. 691; *Kemp v. Carnley*, 3 Duer, 1; *Welsh v. Kelly*, 42 Barb. 98. This question was first raised in the leading case of *Grover v. Wakeman*, *supra*, but was not passed upon. See remarks of Senator Edwards, p. 206. In *Kirby v. Schoonmaker* (3 Sandf. Ch. 46), Chan. Walworth expressed the opinion that if the co-partners were insolvent and unable to pay the debts of the concern, either out of their co-partnership effects or of their individual property, an assignment of the property of both to pay the individual debt of one of the co-partners only would be a fraud upon the joint creditors. But under the facts of that case the opinion does not seem to have been essential. In *Nicholson v. Leavitt* (4 Sandf. 252, 299), Mr.

Justice Duer was clearly of the opinion that where a preference was given to separate creditors in an assignment of partnership property partnership creditors have unquestionable title to relief in equity. He was of the opinion, however, that the illegal provision did not vitiate the whole instrument, but was itself simply void. This case was reversed on appeal on another ground.

The question was distinctly presented to the court of appeals in *Wilson v. Robertson* (21 N. Y. 587). In that case the assignment was made by insolvent co-partners of their firm and individual property, and directing that out of the proceeds of the assigned property certain debts of one of the partners should be paid before all the partnership creditors were paid in full. Mr. Justice Wright, in delivering the opinion of the court, said: "It will be conceded that the creditors of the firm are, legally and equitably, first entitled to the partnership effects. Such creditors have a claim upon the joint effects, prior to every other person, which the court will enforce and protect alike against the individual partners and their creditors. Indeed, the partnership property must be exhausted in satisfying partnership demands, before resort can be had to individual property of the members of the firm. The firm is not liable for the private debts of its members, nor is there any liability resting upon the other members in respect to those debts. An appropriation of the firm property to pay the individual debts of one of the partners is, in effect, a gift from the firm to the partner—a reservation for the benefit of such partner, or his creditors, to the direct injury of the firm creditors. Can it be reasonably doubted that, when an insolvent firm assign their effects for the payment of the private debts of a member, for which neither the firm nor the other members, nor the firm assests nor the interests of the other members therein, are liable, such an assignment and appropriation are a direct fraud upon the joint creditors of the assignors."

And it was held that the assignment was wholly void as to partnership creditors, as having been made with the intent to defraud them.

In *Knauth v. Bassett* (34 Barb. 31), where the assignment was of individual and firm property, with preferences to certain

individual creditors, it was thought that giving full force to the decision in *Wilson v. Robertson*, the assignment was not fraudulent and void *on its face*. Mr. Justice Sutherland remarked: "If, in fact, the assignment included sufficient individual property of each partner to pay his individual debts to be paid by the assignee, I do not think that the case of *Wilson v. Robertson* goes to the extent of holding that the assignment would be fraudulent, although in that case it would appear that the joint assignment included some individual property of the partner whose creditors were preferred. As a question of fact, however, the court found that individual property assigned was not sufficient to pay the individual debt preferred.

In *Hurlbert v. Dean* (2 Abb. Dec. 428; s. c. 2 Keyes, 97), the case of *Wilson v. Robertson* was followed and approved, and it was further decided that the preference of individual debts in such an assignment created a presumption of fraud which rendered the assignment fraudulent and void upon its face, and that the burden of showing the non-existence of such debts rests on the parties claiming under the assignment.

§ 189. *Assignment of individual property providing for payment of firm debts.*—Whether an assignment by a co-partner of his separate property, directing the payment of the firm debts in exclusion of or in preference to his individual creditors, will be sustained, has given rise to some conflict of opinion. The question was first presented to Vice Chan. Sandford, in *Jackson v. Cornell* (1 Sandf. Ch. 348). He examined the question on principle, and arrived at the conclusion that such a preference rendered the whole transfer void. The decision was placed upon the rule of equity, requiring the application of partnership property primarily to the payment of partnership debts, and of individual property to the payment of individual debts. It was said that an assignment which attempts to carry out through trustees a principle which a court of equity will never permit any fiduciary to carry out, is a fraud upon the court and upon the law which tolerates assignments.

In *Kirby v. Schoonmaker* (3 Barb. Ch. 46), which was decided a few years later, the assignment was of both firm and individual property. The assignment provided first for the

payment of a partnership debt, and then for the payment, out of one of the partners' joint and separate portion of the proceeds, of a debt for borrowed money, a part of which was the separate debt of the partner, and the residue the debt of the firm. It also provided for the payment out of the other partners' joint or separate portion of the proceeds of a debt due by him. The chancellor sustained the assignment. He laid down the rule without qualification that co-partners may assign their individual property as well as their partnership property to pay the joint debts of the firm; thereby giving the creditors of the firm a preference in payment out of the separate estate of the assignors over the separate creditors. See remarks of Mr. Justice Brown in reference to this case in *Hurlbert v. Dean*, *supra*, p. 433. The case of *Kirby v. Schoonmaker* (*supra*) was followed and approved in *Van Rossum v. Walker* (11 Barb. 237) and *O'Neil v. Salmon* (25 How. Pr. 246). In the case last cited Mr. Justice Allen distinguishes this class of cases from those which come within the rule established in *Wilson v. Robertson* (21 N. Y. 587). An appropriation of partnership property to the payment of the individual debt of one of the members of the firm is an appropriation of the property of the firm to the payment of a debt for which some of the members of the firm are not liable. "But neither the reason nor the rule applies to an appropriation of individual property to the payment of a firm debt," for the reason that each partner is individually liable for the payment of all the firm debts. Nor is there any rule of equity which gives to the creditors of the individual members of the firm a lien upon their individual property while it is still within their control. Brown, J., in *Hurlbert v. Dean*, 2 Abb. Dec. 428, 435; see *Haggerty v. Granger*, 15 How. Pr. 243.

But an assignment of individual property for the payment of partnership debts, reserving the surplus to the grantors, without any provision for the individual creditors, where there are such, is fraudulent and void as against an individual creditor. This is illustrated by the case of *Collumb v. Caldwell* (16 N. Y. 484), where partners holding certain real estate as tenants in common assigned it, with other property, for the payment of the firm debts, reserving the surplus. This case was again be-

fore the Court of Appeals as *Collumb v. Read* (24 N. Y. 505), and it having then been shown that the real estate assigned was partnership property, the assignment was sustained.

§ 190. *Payment of individual debts out of the joint fund.*

—It has sometimes happened that assignments of firm and individual property, after providing for the payment of partnership debts, have directed the payment of the debts of the several individual partners out of the total residuum remaining. In that event, if the balance belonging to the several partners upon a settlement of the partnership affairs is not in exact proportion to the debts due by them severally, the result of such a provision must necessarily be to appropriate the property of some one of the partners to the payment of debts not owing by him. This was the case in *O'Neil v. Salmon* (25 How. Pr. 246), and the court there held that it was a palpable fraud which vitiated the assignment. And it was further held, that the fact that there may be no surplus after the payment of the partnership debts, and therefore no actual diversion and misapplication of the individual property of either, cannot aid the assignment. But in the case of *Turner v. Jaycox* (40 N. Y. 470), where the facts in this respect were similar, for the purpose of overcoming the presumption of fraudulent intent, each of the assignors was permitted to testify that he owed no individual debts and owned no individual property, and this was deemed sufficient. Such an assignment is undoubtedly voidable by individual creditors, but not by partnership creditors, since they are in no way prejudiced by the illegal provision. *Scott v. Guthrie*, 10 Bosw. 408; 25 How. Pr. 481, 512; *Morrison v. Atwell*, 9 Id. 503; *Smith v. Howard*, 20 How. Pr. 121. The cases cited above must be taken as overruling *Eyre v. Beebe* (28 How. Pr. 333), so far as that case holds that a direction to an assignee, after payment of partnership debts, to pay the private and individual debts of each assignor out of the common fund is not illegal. In that case the court held that the direction being to pay out of the remaining proceeds, the assignee would be presumed to pay the private debts of each partner out of his portion of the proceeds, and such would be taken to be the effect of the conveyance, unless an express provision to the contrary appeared.

§ 191. *Assignment by partners after dissolution.*—Where, upon dissolution of the firm, the joint property is transferred to one of the firm, the effect of such transfer as between the partners is to vest the title to the property in the individual partner, with the right to use and dispose of it as his separate estate. *Dimon v. Hazard*, 32 N. Y. 65. And if the conveyance is made in good faith, and without any intent to defraud the creditors of the firm, or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency, the property becomes separate estate, wholly free from any claims of joint creditors, and the individual partner may make an assignment of it for the payment of his individual debts. *Dimon v. Hazard*, *supra*. Accordingly where I., T. & S. were partners, and I. sold out in good faith to T. & S., and received from them upon the sale their note, and T. & S. continued the business awhile as partners, and then failed and made a general assignment preferring this note and providing for the payment *pro rata* of the debts of the old and new firm, it was held that the creditors of the old firm had no equity against the partnership property of the old firm in the hands of the new firm or their assignee, and that the preference of the note was not fraudulent. *Smith v. Howard*, 20 How. Pr. 121; *Mattison v. Demarest*, 4 Robt. 161. In *Lester v. Pollock* (3 Robt. 691), where two of the members of a firm of three had purchased the share of the other partner, and then executed an assignment directing the assignee to pay off all the debts owing by the new firm and by the old firm, or by either of the members of said firms to a specified creditor, the assignment was declared void as to the creditors of the old firm. And where the conveyance of the firm property is not made in good faith, but with an intent to defraud the creditors of the firm, an assignment made by the purchaser preferring his own creditors will be declared void as to the firm creditors. *Heye v. Bolles*, 2 Daly, 231; see *Paton v. Wright*, 15 How. Pr. 481.

CHAPTER XIV.

FRAUD ON THE FACE OF THE ASSIGNMENT.

§ 192. *Statutory provisions.*—The validity of a general assignment for the benefit of creditors, may be tested by its conformity to the statutory requirements as to its mode of execution (see *ante*, chap. X). Assignments of this character must be made, executed and acknowledged in the manner and according to the forms prescribed by statute. *Kircheis v. Schloss*, 49 How. 284, 287.

If it is wanting in any essential requisite to its validity as a legal instrument under the statute, it will give the assignee no title to the property which may then be levied upon by judgment creditors, or other remedies may be taken to prevent the assignee from carrying the trust into effect. *Daly, F. J., in Place v. Miller*, 6 Abb. Pr. N. S. 178, 180.

And in *De Camp v. Marshall* (2 Abb. N. S. 373, 374), it was said that when there is not a substantial and full compliance with the statute, the courts are bound, as matter of law, to conclude that the assignment was made with intent to defraud creditors. In that case, a portion of the estate was suppressed for the purpose of diminishing the security required of the assignee, and he was directed to pay to a certain creditor, a sum larger than the amount due him, so that the assignment was fraudulent apart from the failure to comply with the statute.

But whether the failure to comply with the requirements of the statute will render the assignment fraudulent, would seem to depend upon the character of the omission and the intent of the assignor.

It does not follow that because the omission to do any or all of the acts required by the statute, may render an assignment in operative and void, that is thereby rendered fraudulent also. *Scott v. Guthrie*, 10 Bosw. 408 ; s. c. 25 How. Pr. 512.

But, although an assignment may conform in every particular to the statutory requirements, it may nevertheless be fraud-

ulent and void as against creditors, because made with the intent to hinder, delay and defraud creditors, and thus within the operation of the statute of frauds. 2 R. S. 72, § 1.

An intent to hinder, delay and defraud creditors, may appear upon the face of the instrument itself.

The instrument of assignment itself may furnish evidence upon its face of an intent to hinder, delay or defraud creditors, or the evidence of such intent may arise from facts and circumstances extrinsic to the writing, but in either case, when such fraudulent intent is established, the assignment is void. The purpose of this chapter is to present the various instances in which courts have held that provisions appearing upon the face of the assignment have furnished evidence of a fraudulent intent.

Beside the statute of frauds, it will become necessary also to refer to another statute, sometimes called "the statute of personal uses." *Rome Ex. Bank v. Eames*, 4 Abb. Dec. 83, 95; s. c. 1 Keyes, 588.

That statute provides, "that all deeds of gift, all conveyances, and all transfers and assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." 2 R. S. 135, § 1.

/ § 193. *Assignments, how construed.*—It has been said that assignments by debtors are not regarded with indulgence by the law; that while the law gives a right of preference, a wholesome policy demands that this right should be watched with strict vigilance, and its exercise restricted to its narrowest limits. Mr. Justice Clerke, in *Wilson v. Ferguson*, 10 How. Pr. 175, 180. And it must be confessed, in not a few instances courts have apparently been more astute to discover grounds on which to set aside the assignment than to sustain it. See remarks of Roosevelt, J., in *Ely v. Cook*, 18 Barb. 612, 614. However, this may be the true rule of construction in reference to general assignments as well as to all other written instruments is *ut res majis valeat quam pereat*.⁷ *Darling v. Rogers*, 22 Wend. 483. An assignment should be upheld, if the language permit it, rather than be defeated, and fraud is

not presumed, unless fairly inferable. *Bingham v. Tillinghast*, 15 Barb. 618.

In construing the provisions of a general assignment, says Mr. Justice Porter, in *Townsend v. Stearns* (32 N. Y. 209, 213), we are to be governed by the rules applicable to ordinary conveyances. There is the same presumption in favor of good faith with respect to them, as in the case of ordinary contracts and conveyances. They will be supported rather than declared void. Where the language of an assignment for the benefit of creditors can be abundantly satisfied by a construction which will support the instrument, such construction should be given. *Benedict v. Huntingdon*, 32 N. Y. 219, 224; *Bogart v. Haight*, 9 Paige, 297; *Mann v. Whitbeck*, 17 Barb. 388; *Sherman v. Elder*, 24 N. Y. 381; *Kellogg v. Slauson*, 11 N. Y. 302; *Platt v. Lott*, 17 N. Y. 478; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainerd v. Dunning*, 30 N. Y. 211; *Read v. Worthington*, 9 Bosw. 617, 630. And where an instrument is ambiguous in its terms, and admits of two constructions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void. *Grover v. Wakeman*, 11 Wend. 187. As far as the cases of *Woodburn v. Mosher* (9 Barb. 255) and *Murphy v. Bell* (8 How. 468), maintain a different rule of construction, they have been overruled by the court of appeals. *Benedict v. Huntington*, 32 N. Y. 219, 227, Potter, J. The burden is on the party who alleges it to be fraudulent upon its face, to show that the instrument is vitiated by some provision affirmatively illegal. *Townsend v. Stearns*, 32 N. Y. 209; *Oliver Lee & Co.'s Bank v. Talcott*, 19 N. Y. 146; *Newman v. Cordell*, 43 Barb. 448.

§ 194. *Fraud in law and fraud in fact.*—It has been declared by the Revised Statutes, that the question of fraudulent intent in all cases arising under the statute, shall be deemed a question of fact and not of law. 2 R. S. 137; 3 R. S. 6th ed. 145, § 4.

When the fraudulent intent is sought to be shown by reason of matters extrinsic to the instrument, or from a state of facts shown to exist operating in connection with the writing, then

it is the province of the jury to determine the question. *Livermore v. Northrup*, 44 N. Y. 107; *Vance v. Phillips*, 6 Hill, 433.

Unless the facts admitted by the parties, or established by the evidence, without dispute or explanation, make the assignment necessarily fraudulent according to the law of the case. *Kavanagh v. Beckwith*, 44 Barb. 192.

But whenever an assignment contains provisions which are calculated *per se* to hinder, delay, or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding of it in opposition to the plain inference to be drawn from the face of the instrument. Mr. Justice Selden, in *Dunham v. Waterman*, 17 N. Y. 9.

And where an assignment on its face shows that it must necessarily have the effect of defrauding the creditors of the assignor, it is conclusive evidence of a fraudulent intent, and it is void. *Kavanagh v. Beckwith*, 44 Barb. 192; see *Sheldon v. Dodge*, 4 Den. 217; *Goodrich v. Downs*, 6 Hill, 438; *Wakeman v. Dalley*, 44 Barb. 498, 503; *aff'd* 51 N. Y. 27; *Griffin v. Marquardt*, 21 N. Y. 121; *Cunningham v. Freeborn*, 11 Wend. 240; *Sturtevant v. Ballard*, 9 Johns. 337; *Forbes v. Watter*, 25 N. Y. 420.

“An assignment for the benefit of creditors, which directs or authorizes such a disposition to be made of the property conveyed, or of its proceeds, as will, if so carried into effect by the assignee, operate to deprive the assignor's creditors of their right to have such property applied to the payment of their claims, is proven by itself, and, therefore, by evidence which is incontrovertible, to be fraudulent, in fact, as against the creditors of the assignor. For the assignor must be held to have intended to do what he has done, and to have designed to defraud his creditors, if the assignment directs or permits it, and the evidence of such intention, there found, is conclusive under well established rules of law, and cannot be contradicted by oral testimony.” Barbour, J., in *Lester v. Pollock*, 3 Robt. 691.

§ 195. *Void in part, good in part.*—Where one or more provisions in an assignment are adjudged to indicate an intent

to hinder, delay, or defraud creditors, the fraudulent intent vitiates the whole instrument and not merely the obnoxious provision. *Wakeman v. Grover*, 4 Paige, 23; s. c. 11 Wend. 187; *Hyslop v. Clarke*, 14 Johns. 458; *Fiedler v. Day*, 2 Sandf. 594; *Mackie v. Cairns*, 5 Cow. 547; *O'Neil v. Salmon*, 25 How. Pr. 246; see *Barney v. Griffin*, 2 N. Y. 365, 372. The taint as to a part affects the entirety. *O'Neil v. Salmon*, 25 How. Pr. 246.

Where a conveyance is good in part and bad in part, as against the provisions of the statute, it is void *in toto*, and no interest passes to the grantee under the part which is good. *Hyslop v. Clarke*, 14 Johns. 458. Indeed, if the whole of the conveyance made in violation of a statute, is not held to be void merely because it may be good in one particular, it would be very easy to elude the statute in every case. One good trust might always be inserted, so that what could not be accomplished directly would be attained indirectly, and in this manner the fraudulent purpose might be easily effected notwithstanding the statute, and the triumph of debtors over their creditors would thus be complete. *Hyslop v. Clarke*, *supra*, 466.

Another and a very satisfactory reason for the rule, is given by Mr. Justice Selden, in *Jessup v. Hulse* (21 N. Y. 168). He says: "If the assignor annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good and disregard the condition; because that would be to take the property from the assignor against his will. He having consented to part with his title only upon certain condition, the transfer and the condition must stand or fall together."

A forcible illustration of the rule is found in the case of *Day v. Fiedler* (2 Sandf. 594), where one of the preferred debts was fictitious, although another preferred debt and the unpreferred debts were all due in good faith, the court held the whole instrument fraudulent and void, and numerous other illustrations will occur in the course of the present chapter.

While there is great harmony in the cases in applying this rule to assignments which are rendered void by reason of fraudulent provisions establishing an intent to hinder, delay, or de-

fraud creditors, yet when the trust created is void by other statutory enactments, a different rule has been applied.

Thus, an assignment of real estate for the benefit of creditors, upon trust to sell *or mortgage* the same, and apply the proceeds to the payment of debts, is a valid instrument under the statutes of uses and trust as to the trust *to sell*, notwithstanding that the trust to mortgage, being for the benefit of creditors at large, is void. *Darling v. Rogers*, 22 Wend. 483; rev'g s. c. as *Rogers v. De Forest*, 7 Paige, 272.

"There can never be any difficulty," says Ver Planck, Senator, in the same case, "in applying this construction of the statute, where the two trusts are wholly separate, though in the same instrument; as where part of the land is conveyed to one purpose, that being a valid one, and part to another and an invalid one, or where the whole is assigned first for a valid trust, and that failing, to some purpose. But when the purposes are in the *alternative*, or when they are mixed and complicated together, the separation of the good and the bad may not be obvious, and sometimes not possible. When the void part is so complicated with a trust otherwise valid, as to form an essential part of the intent and object of the person creating it, it may vitiate the whole, because the trust may be in fact single, though composed of several parts, one of which is void. * * * The prevailing doctrine of equity (and in many cases of our common and statute law also), is that when good and bad provisions are mixed in a deed, the good shall be saved so far as consistent with probable intent."

So where the assignment is assailed under 2 R. S. 135, § 1, as creating a trust for the assignor, the statute avoids only so much of the grant as is not sustained by the valid purposes for which it was made. It does not avoid the entire instrument which contains the invalid use. *Curtis v. Leavitt*, 15 N. Y. 176; *Rome Exch. Bank v. Elmes*, 4 Abb. Dec. 83; s. c. 1 Keyes, 588; *Barney v. Griffin*, 2 N. Y. 365, and see this case commented upon and distinguished in *Campbell v. Woodworth*, 24 N. Y. 304; see also *Van Vechten v. Van Vechten*, 8 Paige, 104, 119; *De Kay v. Irving*, 5 Den. 646; aff'g 9 Paige, 521.

§ 196. *Good as between the parties.*—It should be remarked also in this connection, that a fraudulent provision in an assignment does not render the instrument void as between the assignor and the assignee, but only as to those creditors who do not consent to it. *Smith v. Howard*, 20 How. Pr. 121. The conveyance, though void as to creditors, is good against the grantor and his representatives. *Storms v. Davenport*, 1 Sandf. Ch. 135; *Mackie v. Cairns*, 5 Cow. 547; *Morrison v. Brand*, 5 Daly, 40; *Ogden v. Prentice*, 33 Barb. 160; *Sweet v. Tinslar*, 52 Barb. 271; *Stewart v. Ackley*, 52 Barb. 283; *Waterbury v. Westervelt*, 9 N. Y. 605; *Osborne v. Moss*, 7 Johns. 161; *Jackson v. Cadwell*, 1 Cow. 622. Equity will give no relief to the fraudulent grantor against the grantee by directing an accounting and reconveyance. *Sweet v. Tinslar*, *supra*; *Stewart v. Ackley*, *supra*.

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§ 197. *Indicia of fraud.*—There are certain provisions in conveyances intended to defraud creditors, and certain circumstances attending the execution of such instruments which experience has shown often accompany a fraudulent intent. These are sometimes designated as “indicia of fraud,” or “badges of fraud.” See Bump on Fraud. Con. ch. 4. They create a suspicion of fraud, and sometimes furnish conclusive evidence of a fraudulent intent. The provisions in general assignments which we are about to consider are of this class, and may not inappropriately be designated as “indicia of fraud.”

// § 198. *Assignments exacting releases.*—Great conflict of opinion has existed in the courts of various States as to whether an assignment by an insolvent debtor which limited the right of creditors to participate in the benefits of an assignment by requiring a discharge and release of the debtor from his debts as a condition to such participation, would be sustained. In some instances such assignments have been held valid. *Lippincott v. Barker*, 2 Binn. 174; *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Brashear v. West*, 7 Pet. 608; *McCall v. Hinckley*, 4 Gill, 128; *Green v. Trieber*, 3 Md. 11; *Farquaharson v. Eichelberger*, 15 Id. 63; *Whedbee v. Stewart*, 40 Md. 414; *Night-*

ingale v. Harris, 6 R. I. 321; and see cases collected in *Bur-rill on Assignments*, 3d ed. 232-256.

But in this State it is now the settled law that assignments containing a stipulation for the release of the debtor, whether as a condition for receiving any benefit under the assignment or only as a condition of preference, are fraudulent and void. *Hyslop v. Clarke*, 14 Johns. 458; *Austin v. Bell*, 20 Id. 442; *Wake-man v. Grover*, 4 Paige, 23; s. c. 11 Wend. 187; *Armstrong v. Byrne*, 1 Edw. Ch. 79; *Lentilhon v. Moffat*, 1 Id. 451; *Mills v. Levy*, 2 Id. 183; *Smith v. Woodruff*, 1 Hilt. 462; *Berry v. Riley*, 2 Barb. 307.

The ground of these decisions is well stated by Vice-chancellor McCoun in *Armstrong v. Byrne* (*supra*). He says: "A debtor in failing circumstances may lawfully assign his property for the benefit of his creditors, and prefer one creditor or a class of creditors. But he shall not fix terms or conditions in order to benefit himself, and likewise say to his creditors, 'you must subscribe to these provisions, or you shall not touch the property.' Such conditions are inadmissible. He does not benefit himself by merely creating a preference of payment amongst his creditors, because he remains liable to the others until all his debts are paid; but if he stipulates for an absolute discharge before a creditor shall have the benefit of the property, he thereby assumes to himself a power over the creditors for his own personal advantage, namely, of being discharged from his debts by a payment of a part only. And if he can be allowed to lock up his property by means of such an assignment, until the creditors comply with his terms, he can successfully delay, hinder and defraud his creditors."

§ 199. *Assignment preferring creditors who have executed releases*.—Although the rule is thus fully established in reference to assignments in which preferences are given as a condition for the subsequent execution of a release, yet where the preference is given not conditionally but absolutely, not as a condition for a future release, but as in consideration of a previous release and agreement, the same considerations do not prevail, and the assignment is not necessarily void. *Spaulding v. Strang*, 37 N. Y. 135; 38 Id. 9; rev'g 36 Barb.

310, and 32 Barb. 235; *Low v. Graydon*, 50 Barb. 414; *Powers v. Graydon*, 39 Barb. 548; s. c. 25 How. Pr. 512; *Renard v. Graydon*, 39 Barb. 548; *Renard v. Maydorn*, 25 How. Pr. 178. In the first two cases cited the question arose upon the same assignment. A firm being in insolvent circumstances, made a proposition to their creditors to pay fifty cents on the dollar in full satisfaction of their debts, and a portion of the creditors agreed thereto. Thereupon an agreement in writing was made by the firm with such creditors, by which the former agreed to pay and the latter agreed to accept of fifty per cent. of their debts in full satisfaction; providing, further, that in case the firm should be unable to pay pursuant to the agreement, they should make an assignment, giving a preference as specified in the agreement, of fifty cents on the dollar upon the debts of those who became parties to the agreement. Several creditors became parties, and executed releases of their debts to the firm. The firm was unable to make the payments according to the agreement, and made an assignment giving a preference of fifty per cent. upon the debts of those who had become parties thereto. The question was whether this made the assignment fraudulent. It was held that it did not, for the reason that it was not found or proved that any coercion was used by the assignors to induce the creditors to make the agreement, and for the further reason that at the time the agreement was made, the assignors had made no disposition of their property; that it was still subject to the remedy of creditors, and that, under these circumstances, the parties were at liberty to make any contracts they chose in respect to the terms upon which the indebtedness should be discharged. See these cases distinguished in *Haydock v. Coope*, 53 N. Y. 68, 74.

The other cases cited arose upon an assignment executed by the firm of Graydon, McCreery & Co. The facts were somewhat similar to those in the case above cited. The creditors had executed an agreement of compromise by which they agreed to accept fifty cents on the dollar within a specified time, in full discharge of their debts, whether the moneys was received by preferences in an assignment or other disposition of property (10 Bosw. 653). It was held that the agreement and an assignment subsequently executed were not parts of the same trans-

action (25 How. 179), and the fact that the creditors who had executed the agreement were preferred to the extent of fifty cents on the dollar, did not render the assignment void. The opinions rendered in the case of *Powers v. Graydon* (10 Bosw. 630), are particularly instructive.

Analogous to these cases is *Hastings v. Belknap* (1 Den. 190). There a debtor entered into an arrangement with some of his creditors, by which an assignment of his property was made to trustees, in trust for his creditors, generally, and by which the trustees personally bound themselves to the debtor, to procure for him a release and discharge from all the creditors, except certain ones who were specified. It was held that the assignment was not conditional or partial, or liable to the objection of being intended to coerce a release from the creditors. The rule in reference to all this class of cases is well expressed by Mr. Justice Robertson, in *Powers v. Graydon* (10 Bosw. 630). He says: "In fine, while a debtor is in possession of his property, he has a perfect right to agree to dispose of it as he thinks proper, in payment of lawful debts, and to use that power of disposition as a means of procuring favorable releases; the moment he undertakes to put it out of his possession by a conveyance in trust, such instrument must contain no clause coercive of creditors to release, under the peril of being held void. The mere holding out inducements to creditors in this case to release for less than their claims, upon a promise to prefer him in an assignment, was a perfectly legitimate mode of negotiation."

§ 200. *Preferences conditional upon other acts of creditors.*—But conditions may be imposed upon creditors, limiting their right to a preference where the conditions are such as are not prejudicial to creditors, and are such as are in the line of their duty.

In *Bellows v. Partridge* (19 Barb. 176), the assignment preferred in the third class of creditors two notes made to one H., upon condition that H. accounted for certain collaterals. If he did not account for them, however, no portion of the assigned property was to be applied on these notes until all the residuary creditors were paid, except B. The notes were then to be

paid, and B.'s claim was to follow. In any event, B. was to be paid last. It was held by the court that these provisions were nothing more than the exercise of the assignor's undoubted right to direct preferences and to prescribe the order in which the debts should be paid, and did not render the assignment void.

And when A. borrowed the promissory note of B., agreeing to pay it at maturity, and gave to B. his own note, payable at the same time, A. afterwards indorsed the borrowed note to C., and becoming insolvent, made an assignment, providing for the payment of B.'s note only on condition that B. should surrender the note of the assignor to be canceled. It was held that the two notes constituting but one debt, the condition did not coerce the creditor or secure a benefit to the assignor so as to render the assignment void. *Oliver Lee & Co.'s Bank v. Talcott*, 19 N. Y. 146.

So, where an assignment giving preferences to a first and second class of creditors, who were designated, provided that the assignee should, as soon as convenient, advertise in such paper or papers as he might deem best calculated to give information to the creditors, requesting them to render their claims to him at a reasonable time and place; that the debts of the assignor which should come to the assignee's knowledge by the expiration of such time (not in the first two classes), should constitute the third class, and be paid ratably; that all other debts should be paid after these. It was held not to be fraudulent. *Ward v. Tingley*, 4 Sandf. Ch. 476.

§ 201. *Trusts for the assignor.*—There can be no question, but that a conveyance which places an insolvent debtor's property beyond the reach of his creditors by legal process, and at the same time, either expressly or impliedly, creates a trust in the property for his own use, is void. This point was decided in the case of *Goodrich v. Downs* (6 Hill, 438); see *Mackie v. Cairns* (5 Cow. 547, 548). The decision in *Goodrich v. Downs* was based upon the statute which prohibits the creation of a trust for the use of the person making the same. 2 R. S. 6th ed. 142, § 1. And so far as the decision turned upon that statute, it was overruled in *Curtis v. Leavitt*, 15 N. Y. 9; see

Collomb v. Caldwell, 16 N. Y. 484. But the doctrine of the decision, to wit, that an assignment by an insolvent is void for actual fraud if it contains a reservation of benefit for the assignor, is undoubted. See *Collomb v. Caldwell, supra*; *Barney v. Griffin*, 2 N. Y. 365.

The construction placed upon the statute, in *Curtis v. Leavitt* (15 N. Y. 9), is such that it would not ordinarily apply to assignments for creditors. It was there held that the statute applies only to conveyances and transfers, wholly or primarily for the use of the grantor, and not to instruments for other and active purposes, when the reservations are incidental and partial only; that if it can be applied to instruments executed for real and active purposes, such as to secure debts or to procure money on loans, it avoids only so much of the grant as is not sustained by the valid purposes for which it was made. It does not avoid the entire instrument which contains the invalid use.

But in *Wilson v. Robertson* (21 N. Y. 587, 594), which was an assignment by a firm preferring certain debts of one of the partners, Mr. Justice Wright, who spoke for the court, seemed to be of the opinion that the assignment would be void under the statute referred to. And see *McClelland v. Remsen*, 36 Barb. 622; *Powers v. Graydon*, 10 Bosw. 630; *Scott v. Guthrie*, Id. 420; s. c. 25 How. Pr. 512; *Rome Exch. Bank v. Eames*, 4 Abb. Dec. 83, 95; *Spies v. Boyd*, 1 E. D. Smith, 445, 448; *McLean v. Button*, 19 Barb. 450.

§ 202. *Reservations of property*.—A mere exception of property from the assignment, is a different thing from a reservation to the debtor of a benefit from the assigned property. Thus, where certain specified property was exempted from the operation of the assignment, the conveyance was not for that reason declared invalid. *Carpenter v. Underwood*, 19 N. Y. 520. So, in another case, where an insolvent debtor, in assigning his personal estate for his creditors, authorized the assignees to use a judgment previously confessed by him to secure them against contingent liabilities as his sureties, for the purpose of perfecting title to his real estate, declaring that all that should be realized from the real estate should be assets in the hands of the trustees, to be distributed according to the terms

of the assignment; but he did not assign his statutory right of redeeming the land from a sale on the judgment, or his right to the rents and profits before the expiration of the period of redemption. It was held that this was not such a reservation of property as vitiated the assignment. *Dow v. Platner*, 16 N. Y. 562.

§ 203. *Reservation to assignor of a benefit out of the assigned property.*—It has been declared a great many times with the greatest emphasis, that the reservation of any benefit to the assignor from the assigned property, will render the assignment fraudulent and void as against creditors not assenting. *Grover v. Wakeman*, 11 Wend. 187; s. c. 1 Am. L. Cas. 63; *Mackie v. Cairns*, 5 Cow. 549; *Goodrich v. Downs*, 6 Hill, 438; *Judson v. Gardner*, 4 N. Y. Leg. Obs. 424; *Lentilhon v. Moffatt*, 1 Edw. 451; *Hyslop v. Clarke*, 14 Johns. 458; *Nicholson v. Leavitt*, 4 Sandf. 252, 273; *Jackson v. Parker*, 9 Cow. 73, 86; *Mead v. Phillips*, 1 Sandf. 83, 86.

In *Mackie v. Cairns* (5 Cow. 547; s. c. 1 Hopk. 373), the assignment contained a provision that the assignees should pay to the assignor the sum of two thousand dollars a year for his support; this clause was declared to render the assignment wholly void. This and subsequent cases have reversed a contrary ruling in *Murray v. Riggs*, 15 Johns. 571; and *Austin v. Bell*, 20 Johns. 442.

So where the assignor preferred a claim for rent accruing before and subsequent to the assignment, for the purpose of securing to himself and family the future use of a dwelling-house, the assignment was declared void. *Elias v. Farley*, 2 Abb. Dec. 11; s. c. 3 Keyes, 398; 5 Abb. Pr. N. S. 39. A stipulation that the assignor shall be permitted to transact business for a certain period without any proceedings being taken against him, either at law or equity, avoids the assignment. *Berry v. Riley*, 2 Barb. 307. So where an assignment was made by one partner in an insolvent firm, to the other partner, of the property of the firm which could not be reached by execution, in trust to pay the assignor's expenses in obtaining the benefit of the insolvent act, and the costs of all suits that might be brought by the creditors of the firm, and for the payment of

the creditors in a certain order, it was held that it was fraudulent and void. It was a palpable attempt by the partners to keep the property under their own control. Unless there was a surplus beyond the firm debts, the assignor had no interest in the partnership effects, which could pass by the assignment, so as to give any greater interest to the assignee than he before had. The only effect of the assignment was to exclude the assignor from any control over the property. *Sewall v. Russell*, 2 Paige, 175.

§ 204. *Resulting trust to the assignor.*—When the property is conveyed in trust generally for the payment of debts, after the object of the trust is accomplished, what remains will revert to the assignor by operation of law. *Wintringham v. Lafoy*, 7 Cow. 735. And in conformity with this rule of law it has been held that when the assignment was for the equal benefit of all the assignor's creditors, allowing no exceptions, with no preferences, a provision that after all the creditors should be fully paid and satisfied, the surplus should be repaid to the assignor, is not improper. *Ely v. Cook*, 18 Barb. 612; *Van Rossam v. Walker*, 11 Barb. 237; *Wintringham v. Lafoy*, *supra*.

But, as we have seen (*ante*, § 168), where the assignment is of all the property for the benefit of a portion only of the creditors, an express reservation of the surplus to the assignor will render the assignment void. *Barny v. Griffin*, 2 N. Y. 365; *Goodrich v. Downs*, 6 Hill, 438; *Lansing v. Wordsworth*, 1 Sandf. Ch. 43; *Strong v. Skinner*, 4 Barb. 546; and see *Columb v. Caldwell*, 16 N. Y. 484.

§ 205. *Provisions for continuing the assignor's business.*—A provision in an assignment authorizing the assignees to continue the business of the assignor will render the assignment void. Thus, where a part of the assigned property was unfinished machinery and engines in process of manufacture, and the assignment provided that the assignees should "pay any such sums of money as they might find proper and expedient, in and about the management of the said property or payment of hands employed or to be employed in and about the same, or in the

business of completing the manufacture of any of the said property, or fitting the same for sale, or of making up material, &c., so as to realize the greatest possible amount of money therefrom," this clause was held to avoid the assignment. *Dunham v. Watterman*, 17 N. Y. 9; rev'g 3 Duer, 166; overruling *Cunningham v. Freeborn*, 11 Wend. 240; *Renton v. Kelly*, 49 Barb. 536.

The right of the assignee to continue the business, irrespective of any express power in the assignment, will be considered hereafter.

An authority to the assignee "to manage and improve" the assigned estate, where the property consisted of a stock of goods, was held to render the assignment fraudulent and void upon its face. *Schlusell v. Willet*, 12 Abb. Pr. 397; s. c. 34 Barb. 615.

But where the assignment conveyed real estate heavily encumbered, and authorized the assignees to manage and improve the assigned property, it was held that a fair construction of the language was, that the property was to be so managed and improved or ameliorated in respect to its condition as would be most beneficial for the estate and the creditors, and should not be regarded as authorizing the assignees to retain the assigned property for the purpose of erecting buildings, making alterations and repairs upon the real estate, and to use the trust fund for such purposes, and thus to hinder, delay, and prevent creditors from obtaining their just debts. *Hitchcock v. Cadmus*, 2 Barb. 381. 10-77W 575-

§ 206. *Future liabilities*.—A general assignment which contains a provision for the payment out of the proceeds of the assigned property of future advances to the assignor, or of future liabilities which the assignees may assume for him, in preference to or to the exclusion of the debts which are due to creditors whose debts had been contracted previous to such assignment, is fraudulent and void as against such creditors. *Barnum v. Hempstead*, 7 Paige, 568; *Lansing v. Wordsworth*, 1 Sandf. Ch. 43.

A sheriff assigned, for the benefit of his creditors, his fees due and to become due. One of the objects of the assignment

was to indemnify his sureties against future misappropriation of moneys which should be collected on executions. The assignment was held to be void. *Currie v. Hart*, 2 Sandf. Ch. 353.

And where the assignor preferred a creditor on a claim for rent, part of which was to accrue subsequent to the assignment, this was held to invalidate the assignment. *Elias v. Farley*, 2 Abb. Dec. 11; s. c. 3 Keyes, 398; 5 Abb. Pr. N. S. 39.

But a direction in an assignment authorizing the assignee to pay "debts due and to grow due" is not objectionable. It confines the payment to debts, &c., for which the assignor was then liable. It could not in any way be made to cover debts not then in existence. *Van Dine v. Willet*, 38 Barb. 319; s. c. 24 How. 206. See *Butt v. Peck*, 1 Daly, 83.

A direction to the assignee to pay to certain preferred creditors "the sums of money which are or may be due to them," and afterwards to pay the rest of the creditors "what may be due to them," is valid.

Such an assignment is not objectionable on the ground that, under its provisions, a preferred creditor could purchase other demands than those he held at the time of the assignment, and thus secure a preference for them also. For the provision giving a preference to the specified creditors for sums which "may become due to them," should be construed to apply to actual debts already owing to them, or contingent liabilities already incurred by them, at the time of the assignment and thereafter to become payable.

Nor is the assignment objectionable because it might exclude those creditors whose debts had become payable at the time of making the assignment. The direction to pay the rest of the creditors such sums as "may become due to them" cannot be construed to exclude the payment of claims already due. *Read v. Worthington*, 9 Bosw. 617.

But if the intention was to secure debts or claims not then in existence, but which were afterwards to be created, either by the assignor or the assignee, it would be void. *Brainerd v. Dunning*, 30 N. Y. 211; *Sheldon v. Dodge*, 4 Den. 217; *Lansing v. Woodworth*, 1 Sandf. Ch. 43.

In this respect an assignment differs noticeably from a mort-

gage, which may be made to secure future as well as present responsibilities. *Hendricks v. Robinson*, 2 Johns. Ch. 283; affi'd as *Hendricks v. Walden*, 17 Johns. 438.

§ 207. *Contingent liabilities*.—Liabilities actually existing, although contingent in their character and not yet matured, may be protected by an assignment. Instances of this are liabilities as indorser, surety, or bail. *Keteltas v. Wilson*, 36 Barb. 298; s. c. 23 How. Pr. 69; *Griffin v. Marquardt*, 21 N. Y. 121; *Loeschigk v. Jacobson*, 26 How. Pr. 526; s. c. 2 Robt. 645; *Cunningham v. Freeborn*, 11 Wend. 241; s. c. 1 Edw. 256; 3 Paige, 537; *Brainerd v. Dunning*, 30 N. Y. 211.

Whatever debt, says Mr. Justice Robertson, in *Read v. Worthington* (9 Bosw. 617, 628), can be secured by conveyance directly to the surety, may be secured by one to an assignee in trust; nor is there any principle which puts a contingent liability beyond the reach of being protected. An assignment to protect a contingent liability no more hinders or delays a creditor, than one to pay a debt not yet due, even if the assignees were not authorized to pay such debt before its maturity. Assignees have a right to retain sufficient in their hands to meet such liability, and distribute the residue; and after the liability is disposed of, distribute what remains.

Liabilities of the debtor upon which others are indorsers or sureties may be provided for. *Bank of Silver Creek v. Talcott*, 22 Barb. 550. And where the evidences of debt are in the hands of third parties, a direction to pay the debt, although the holder is not named, will amount to an appropriation of the property assigned to the payment of such debts. *Griffin v. Marquardt*, 21 N. Y. 121.

§ 208. *Provisions tending to delay*.—Any provision contained in the assignment, which shows that the debtor at the time of its execution intended to prevent the immediate application of the assigned property to the payment of the debts, will avoid the assignment, because it shows that the assignment was made with the intent to hinder and delay creditors in the collection of their debts. *Brigham v. Tellinghast*, 13 N. Y. 215; *Townsend v. Stearns*, 32 N. Y. 209.

Numerous illustrations of this rule will be found in the succeeding sections, where directions to the assignee as to the time, manner and terms of sale of the assigned property, and instructions as to the disposition of the proceeds have been held fatal to the assignment, because indicating a fraudulent intent to hinder and delay creditors. *D'Ivernois v. Leavitt* (23 Barb. 63), is directly in point. In that case the assignments contained provisions allowing the assignee to withhold the distribution and division of the assets for any length of time, which he, in his discretion, might think proper. In declaring the assignments void for this reason, the court said: "This, if carried out, gives him a coercive power over the creditors, arming him with the means of constraining them to a commutation or release of their claims. It is in a great measure to prevent and ignore such a design, that courts of justice have so generally, of late, evinced a disposition to avoid all instruments investing the assignee with any discretion beyond what is absolutely inseparable from the performance of his trust." See *Storms v. Davenport*, 1 Sandf. Ch. 135.

§ 209. *Directions as to the time of sale.*—Creditors are entitled to have the assigned property converted into money and applied to the payment of their debts, without any unreasonable delay. *Meachem v. Stearns*, 9 Paige, 406. And any provision contained in an assignment which shows that the debtor, at the time of its execution, intended to prevent such immediate application, will avoid the instrument, because it shows that it was made with "intent to hinder and delay creditors in the collection of their debts." *Brigham v. Tellinghast*, 13 N. Y. 215, 220; s. c. 15 Barb. 618. Thus in *Woodburn v. Mosher* (9 Barb. 255), where the assignees were authorized to convert the premises into money "within convenient time as to them shall seem meet," this clause was held to render the assignment void; and in *Murphy v. Bell* (8 How. 468), where the same language was employed, it was held equally fatal. But these cases probably carried the rule of an adverse construction too far (see *ante*, § 193). In *Benedict v. Huntington* (32 N. Y. 219, 227), where substantially the same language was held to be

unobjectionable, and the later cases in the Court of Appeals, a rule of construction more favorable to the validity of the instrument appears to have been adopted. In *Ogden v. Peters* (21 N. Y. 23), where the provision was to convert the property "into cash as soon as the same may conveniently and properly be done," this language was considered harmless, as conferring no power or direction outside of the duty of the assignee to go on at once and convert the estate, and pay the debts. In *Griffin v. Marquardt* (21 N. Y. 121), where the direction was "to sell the property without delay for the best price that can be procured," it was held that a fair interpretation of this language was, that the assignee should proceed to sell and convert the assigned property into money without unnecessary or unreasonable delay; although it is declared that if the direction operated to vest any discretionary power in the assignee not legally incident to his trust, nor to be, on the application of creditors, at all times controlled by the court, it would be the duty of the court to pronounce the assignment fraudulent.

In *Jessup v. Hulse* (21 N. Y. 168), the assignee was empowered "to sell, dispose of and convey the said real estate and personal property at such time or times, and in such manner as shall be most conducive to the interests of the creditors of the said party of the first part, and convert the same into money as soon as may be consistent with the interests of said creditors." This provision was held to be but a mere affirmance of the legal obligations of the assignee, and therefore did not affect the validity of the instrument.

In *Townsend v. Stearns* (32 N. Y. 209), the assignee was clothed with full power "to sell and dispose of the assigned premises at such time or times, and in such manner as to him may seem to be most for the benefit and advantage of the creditors." It was held that this provision was free from all objection. And see *Wilson v. Robertson*, 21 N. Y. 587; *Bellows v. Partridge*, 19 Barb. 176; *Clapp v. Utey*, 16 How. Pr. 384.

§ 210. *Provisions as to the mode of sale.*—The general principles which are applicable to provisions in reference to the time of sale apply equally to provisions in reference to the

manner of sale. The assignment must contain no provision which conflicts with the obligations conferred by law upon the assignee. He is bound to bring the property to sale in the manner most advantageous to creditors, and this may be either at public auction or at private sale. Hence a provision in the assignment which authorizes him to sell the property "at public or private sale, as he shall deem most beneficial to the interest of the creditors," is not objectionable. *Halstead v. Gordon*, 34 Barb. 422.

But a restriction in the assignment requiring the assignees to sell at public sale may render the assignment null and void, especially where, taken in connection with other circumstances, it shows that the object of the whole transaction was to coerce or persuade the creditors into a settlement. *Work v. Ellis*, 50 Barb. 512. And, doubtless, if by the terms of the assignment itself the assignee was directed to delay the sale of the property, so as to dispose of it at retail, that would be a fraud upon creditors. *Hart v. Crane*, 7 Paige, 37.

§ 211. *Authority to sell on credit.*—It has been frequently decided that an express power reserved in the assignment to the assignee to sell on credit will vitiate the assignment. *Nicholson v. Leavitt*, 6 N. Y. 510; 10 Id. 591; rev'g s. c. 4 Sandf. 252; *Burdick v. Post*, 6 N. Y. 522; aff'g 12 Barb. 168; *Griffin v. Barney*, 2 N. Y. 365; *Porter v. Williams*, 9 N. Y. 142; *Rapalee v. Stewart*, 27 N. Y. 310; *Wilson v. Robertson*, 21 N. Y. 587; *Gates v. Andrews*, 37 N. Y. 657; *Houghton v. Westervelt*, Seld. Notes, 147; *Morrison v. Brand*, 5 Daly, 40; *D'Ivernois v. Leavitt*, 23 Barb. 63; *Whitney v. Krows*, 11 Barb. 198.

A contrary opinion was expressed by the chancellor in *Rogers v. De Forest* (7 Paige, 278); but the authority of that case must be regarded as overruled by the cases cited above.

The ground of this rule is well expressed by Mr. Justice Bronson in *Barney v. Griffin* (2 N. Y. 365, 371). An insolvent debtor cannot, under color of providing for creditors, place his property beyond their reach in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit without delay.

They have the right to determine for themselves whether the property shall be sold on credit; and a conveyance which takes away that right and places it in the hands of the debtor, or of trustees of his own selection, comes within the very words of the statute; it is a conveyance to hinder and delay creditors, and cannot stand."

An assignment which withholds from the assignee any discretion to sell the trust property on credit, and requires it to be sold only for cash, is not void for that reason. *Carpenter v. Underwood*, 19 N. Y. 520; *Grant v. Chapman*, 38 N. Y. 293; *Stein v. Fisher*, 32 Barb. 198; *Van Rossum v. Walker*, 11 Barb. 237. In the case last cited it is said:

"It may be that such a provision is an unwise one, and one that ought not be countenanced; and when there are any circumstances which go to show that a forced sale was intended, to the injury of the creditors, it ought to be taken into consideration as an important item of evidence, which, in connection with the other circumstances, would justify this court in setting aside the assignment. But it seems to me that this is all the effect which should be given to such a provision." Edwards, J.

Where it can be fairly inferred from the language of the assignment, that it was the intention of the assignor to confer upon the assignee a power to sell on credit, it will be equally fatal to the assignment. The construction of the language employed in assignments has given rise to much discussion as to when an authority to sell on credit will be inferred. In *Meachem v. Stearns* (9 Paige, 398), where an assignment directed the trustee to sell the trust property at such reasonable times as shall seem proper to him, it was held that he was not authorized to sell the property at retail and on credit, nor to send it to agents to be sold on commission.

In *Whitney v. Krows* (11 Barb. 198), where, by the terms of the assignment, the assignees were authorized "to sell and dispose of the property upon such terms and conditions as, in their judgment, may appear best and most for the interest of the parties concerned, and convert the same into money," it was held that the discretion conferred upon the assignees was a discretion to sell upon lawful terms, and since a sale on credit is

unlawful, it was not to be inferred that such authority was intended. It is said that a fair construction of the whole provision is that the trustees are to exercise their judgment as to the manner of sale, but when they sell they are to receive the money. They are to convert the property into *money* not into *debts*.

But in *Moir v. Brown* (14 Barb. 39, 51), where the same language was used in the assignment, Mr. Justice Hand said: "This language certainly gives a broad discretionary power; sufficient, in an ordinary power of attorney, to sustain a sale on credit." The assignment, however, was declared void upon other grounds.

In *Schufeldt v. Abernethy* (2 Duer, 533), where the authority to the assignee was to sell the assigned property on such terms and conditions as, in his judgment, might be deemed best, it was held, on the authority of *Nicholson v. Leavitt* (6 N. Y. 510; rev'g 4 Sandf. 252), that the assignment was fraudulent and void on its face, because conferring upon the assignee a discretionary power to sell on credit. To the same effect is *Lyons v. Platner* (11 N. Y. Leg. Obs. 87). In *Nicholson v. Leavitt*, however, there was an express authority to sell on credit. The language of the assignment was to sell "for cash or on credit, or partly for cash and partly upon credit."

This difference in the language was noticed, but the court were of opinion that the discretion conferred upon the assignees was one which, by a necessary implication, conveyed the power to sell on credit.

In *Kellogg v. Slauson* (15 Barb. 56), in the Supreme Court, substantially the same language was held to be unobjectionable. It was held that the words employed could be fully satisfied short of conferring a power to sell on credit. And this opinion was sustained on appeal to the Court of Appeals (11 N. Y. 302). And to the same effect are *Southworth v. Sheldon*, 7 How. Pr. 414, and *Clark v. Fuller*, 21 Barb. 128; *Nichols v. McEwen*, 21 Barb. 65; aff'd 17 N. Y. 22; *Wilson v. Robertson*, 21 N. Y. 587; *Benedict v. Huntington*, 32 N. Y. 219; s. c. 19 How. Pr. 350; *Townsend v. Stearns*, 32 Id. 209.

In *Brigham v. Tellinghast* (15 Barb. 618), where the assignee was directed to convert "all and singular the premises

and estate aforesaid into money or *available means*," the court at general term were of opinion that the words "available means" signified means suitable for the purpose described, to wit, the payment of debts, and therefore was unobjectionable. But on appeal to the Court of Appeals, the judgment of the Supreme Court was reversed on the ground that the clause referred to necessarily conferred a power upon the assignee to convert the assigned property into securities which were not money.

And in *Bellows v. Partridge* (19 Barb. 176), where the trust was to convert the assigned property into money by sale, either public or private, as soon as reasonably practicable with due regard to the rightful interests of the parties concerned, this was held not to authorize a sale on credit. This case, however, turned principally upon the supposed authority to delay the sale of the property, and falls among the class of cases to which we have previously referred. See *ante*, § 209.

The principle which courts have adopted in construing the language of assignments in the particular as to which we are now inquiring, is well illustrated by the case of *Rapalee v. Stewart* (27 N. Y. 310). There the language was "to convert into cash or otherwise dispose of to the best advantage." These words clearly conferred a discretion to dispose of the property otherwise than for cash. They conferred not merely a discretion to act inside the rules of law, but a discretion to exceed the limits which the law allows in the execution of such trusts. They were consequently declared fatal to the validity of the assignment.

§ 212. *Power to declare future preferences*.—An assignment which reserves to the assignor the right to give future preferences is fraudulent and void. The same is the case if the assignee be empowered to give future preferences. *Boardman v. Halliday*, 10 Paige, 223; *Barnum v. Hempstead*, 7 Id. 568; *Averill v. Loucks*, 6 Barb. 470; *Sheldon v. Dodge*, 4 Den. 217; *Strong v. Skinner*, 4 Barb. 546; *Kircheis v. Schloss*, 49 How. Pr. 284; *Grover v. Wakeman*, 4 Paige, 24; s. c. 11 Wend. 187, 203.

"The reason," says Mr. Justice Van Vorst, in *Kircheis v.*

Schloss (*supra*), “why the reservation of such power in the assignors is fraudulent, is obvious. The debtor, in such an assignment, puts his property beyond the reach of his creditors, and yet reserves the right to control the manner of its distribution among them, which control would enable him to exact from them such terms as he might choose to offer.” And somewhat similar language is employed by Chancellor Walworth in *Boardman v. Halliday* (*supra*). He says: “One very serious objection to such an assignment is that none of the creditors among whom such preferences are to be given, can ever know what their rights are, under the assignment, where the fund is insufficient to pay all the debts; so as to render it safe for them to attempt to assert those rights in any suit or proceeding. For if any one of such creditors should institute a suit to compel the assignees to account, and pay over the trust fund as directed by the assignment, such assignees would unquestionably exercise the discretion of preferring other creditors to him. * * * The effect of the assignment, therefore, is to place the creditors directly within the power of the assignees, and to compel them to acquiesce in such terms as the assignees may think proper to prescribe, as the only condition upon which they can get any part of the proceeds of the property of their debtor.”

§ 213. *Power to compound with creditors.*—A provision in an assignment which gives an assignee full power and liberty to compound with all or any of the creditors in such manner and upon such terms as they shall deem proper, but so as not to interfere with or depart from the order of preference established in the assignment, does, in effect, perpetuate the right of giving preferences by vesting in the assignees an arbitrary power of compounding with any one of the creditors upon such terms as they may think proper. Such a provision, therefore, cannot be sustained. *Grover v. Wakeman*, 4 Paige, 24; s. c. 11 Wend. 187, 203. In *Van Nest v. Yoe* (1 Sandf. Ch. 4, 5), where it was provided in the assignment as follows: “nothing, however, hereinbefore contained, shall be considered as restricting or preventing” the assignee “from liquidating or compounding with any of the creditors by making or assigning or transferring any

of the choses in action, debts or accounts due to the assignors ; ” the court refused to infer a fraudulent intent from this clause.

§ 214. *Power to compound debts due the assignor.*—When the authority is to compound claims due to the assignor, there is no necessary implication of fraudulent intent. So where the assignee in the collection of the debts was authorized, in the exercise of a sound discretion, to compromise such as were doubtful by receiving a part of the money due, this clause was held to be unobjectionable. *Dow v. Platner*, 16 N. Y. 562. And where the assignees were authorized “to compromise all bad and doubtful claims,” it was held that this clause was not of itself evidence of a fraudulent intent. *Bingham v. Tillinghast*, 15 Barb. 618. And a similar conclusion was reached where the direction to the assignee was to compound, compromise, and settle the claims assigned, in his discretion. *Bellows v. Partidge*, 19 Barb. 176. But some doubt as to the validity of such provisions was suggested in the case of *Murphy v. Bell* (8 How. Pr. 468).

Such provisions are unnecessary. The assignee may be authorized under the provisions of the Act of 1877, in a proper case, to compromise or compound any claim or debt belonging to the estate, upon application to the county court. Laws of 1877, ch. 466, § 23. See *post*, Chap. XXIII.

§ 215. *Power to pay taxes, insurance and rent.*—When part of the property assigned is real estate, the assignment is not rendered void by a direction to pay rents, taxes and assessments, which may become due before the lands can be sold, as this may be presumed to have been intended for the benefit of creditors, where an immediate sale is contemplated, and there is no proof of fraud. *Morrison v. Atwell*, 9 Bosw. 503.

A direction in an assignment, that the assignee should pay the rents and taxes on the real estate until sold, is a necessary power to preserve the property, and the assignee would have been authorized to do it, if the authority had not been included in the instrument itself. *Van Dine v. Willett*, 38 Barb. 319 ; s. c. 24 How. 206.

An assignment will not be rendered invalid because it con-

tains a provision authorizing the assignees to effect an insurance upon a portion of the assigned property, and to keep good an insurance already existing, upon another portion of the property, so long as in their judgment it shall be necessary. *Whitney v. Krows*, 11 Barb. 198. And in the same case, it was held that an assignment was not vitiated by a provision authorizing the assignees, if they shall deem it necessary, to pay the interest on a mortgage which is a prior lien upon the assigned property, and the principal and interest on another mortgage, if they shall deem it for the interest of the creditors to do so.

And where an assignment by copartners authorized the assignee to pay the rents, taxes and assessments on the separate property of the individual copartners, it was held that this would not confer an authority to make the payments out of the partnership funds. *Eyre v. Beebe*, 28 How. Pr. 333.

§ 216. *Power to employ agents, attorneys, &c.*—A general assignment is not rendered fraudulent and void on its face by a provision authorizing the assignee “to employ suitable agents at a reasonable compensation, to be paid out of the effects assigned, and generally to adopt such measures in relation to the settlement of the estate as will, in his judgment, promote the true interest thereof.” The discretion conferred by such a provision will not be construed to mean a discretion unlimited by the rules of law, but one to be kept within the legal limits. *Mann v. Witbeck*, 17 Barb. 388; *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Janes*, 37 N. Y. 608; *Van Dine v. Willett*, 38 Barb. 319; s. c. 24 How. Pr. 206. So an authority to employ an attorney. *Van Dine v. Willett*, *supra*; *Jacobs v. Remsen*, *supra*.

But a provision authorizing the payment of “a reasonable counsel fee” to the assignee, a lawyer, in addition to the expenses and commissions for executing the trust, is illegal, and renders the assignment void. *Nichols v. McEwen*, 17 N. Y. 22; *affi’g* 21 Barb. 65.

§ 217. *Provisions exempting assignee from liability.*—“Every provision in an assignment, which exempts the assignee from any liability that he would by law be subjected to as assignee, is of itself a badge of fraud.” Sandford, J., in *Litchfield v. White*, 3 Sandf. 545.

Thus, an assignment containing a clause that the assignee shall not be liable or accountable for any loss that might be sustained by the trust property or the proceeds thereof, unless the same should happen by reason of the gross negligence or willful misfeasance of the assignee, is void. *Litchfield v. White*, 7 N. Y. 438; affi'g 3 Sandf. 545.

Where it is provided in an assignment that the assignee shall not be accountable, except for gross neglect and willful misfeasance, and only for property that may come to his hands and under his control, the legal inference is that the assignment is made with a fraudulent intent. *Olmstead v. Herrick*, 1 E. D. Smith, 310. And see *Metcalf v. Van Brunt* (37 Barb. 621), where a similar provision was assumed to avoid the instrument.

The ground of this rule is stated by Mr. Justice Daly, in *Olmstead v. Herrick*, *supra*, as follows: "When a man in failing circumstances assigns his property in trust for the payment of his debts, he is bound to select an assignee that will do all that the law requires of a trustee, in respect to the rights of those that have a beneficial interest in the property assigned. When the debtor, therefore, absolves his assignee from the exercise of that care and diligence essential to the due administration of the trust—when he consents that he shall be released from all liability, except when he is guilty of willful misfeasance or gross neglect,—that is, that he shall not be answerable for any losses that may be occasioned by his want of ordinary caution, his inexcusable mistakes, or any act of negligence which is not gross in degree, the debtor does that which he has no right to do. It is urged that as the condition is repugnant to the policy of the law, the assignee would, notwithstanding its existence, continue liable for the want of ordinary care and diligence. Upon this point, however, I think that creditors coming in under this assignment, and claiming the benefit of its provisions, would be bound by the stipulation upon which the assignee accepted the trust." See *Jewett v. Woodward*, 1 Edw. 195, 197.

Where the assignment contains a provision that the assignees should not be accountable for the defalcation of any clerk employed by the assignors, it will be void. *Van Nest v. Yoe*, 1 Sandf. Ch. 4.

In *Jacobs v. Allen* (18 Barb. ⁵⁴⁹~~495~~), where the assignment provided that the trustee should not be answerable for the acts, neglects or defaults of any attorney or agent that they might appoint, nor for any misfortune, loss or damage which might happen without their willful default, but this provision was followed by an express covenant on the part of the assignees, to accept the trust and to act faithfully and justly in the execution of the same. It was held that these clauses construed together did not render the assignment fraudulent upon its face. In *Casey v. Janes* (37 N. Y. 608), it is said that it is usual to insert in an assignment, more for the protection of the assignee against liability for demands against insolvent and irresponsible parties than for any other purpose, a clause exonerating the assignee from liability to account for debts which he is unable to collect, and such a clause does not vitiate the assignment.

§ 218. *Power to defend suits and to pay costs.*—An assignment by an insolvent debtor, which provides for the payment of all costs and expenses necessarily incurred by the assignor, in defending any suits that might be instituted against him by any creditor or other person, for anything growing out of the assignment, or in any way connected with it, is fraudulent as against creditors. *Mead v. Phillips*, 1 Sandf. Ch. 83.

It is a fraud upon the creditors to authorize the assignee to employ the proceeds of the assigned property in defending suits which may be brought against the assignor by his creditors, to recover their several debts. *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Levy's Accounting*, 1 Abb. N. C. 177, 181. But an authority to the assignee "to commence, continue, maintain and prosecute to effect, and also to defend all actions at law and equity, and other proceedings which they may deem necessary to the execution of the said trust," confers upon the assignees a discretionary power to defend suits, which they would exercise at their peril as between themselves and the creditors interested. *Van Nest v. Yoe*, 1 Sandf. Ch. 4.

§ 219. *Power to lease or mortgage.*—A power to lease or mortgage the assigned estate, is void. *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Darling v. Rogers*, 22 Wend. 483; s. c.

as *Rogers v. De Forest*, 7 Paige, 272. The only trust which can be created in real property, for creditors, is a trust to sell. 1 R. S. 728, § 55. But an attempt to create a void trust, to lease or mortgage, does not invalidate the whole instrument, the legal trust only is ineffectual. *Darling v. Rogers*, 22 Wend. 483; *Van Nest v. Yoe*, 1 Sandf. Ch. 4.

CHAPTER XV.

FRAUD FROM EXTRINSIC CIRCUMSTANCES.

§ 220. *In general*.—In the previous chapter attention has been called to those provisions appearing upon the face of the assignment, which have been brought into question before the courts as indicating a fraudulent intent on the part of the assignor. The object of the present chapter is to consider those matters which, taken in connection with the assignment, but not necessarily appearing upon its face, will furnish evidence of a similar fraudulent intent.

§ 221. *Incidental delay*.—Conveyances made with the “intent to hinder, delay or defraud” creditors are void. The necessary effect of every general assignment, even where the creditors are to be paid *pari passu*, is to hinder and delay creditors in the collection of their debts. *Nicholson v. Leavitt*, 4 Sandf. 252, 284. If mere hindrance and delay, therefore, avoided an instrument of this nature, then, of course, in no case whatever could it be upheld. But as the law recognizes and upholds such a disposition of a debtor’s property when it is in other respects without taint, it is palpable that the mere effect of hindrance and delay cannot invalidate the conveyance. But the delay must be incidental, and necessary to the existence of the trust or the exercise of the power. *Nicholson v. Leavitt*, 6 N. Y. 510, 515, Gardiner, J.; and see remarks of Duer, J., in s. c., below, 4 Sandf. 252, 284; and *Eyre v. Beebe*, 28 How. Pr. 333, Clark, J.; *Meaux v. Howell*, 4 East, 1; *Wilder v. Winne*, 6 Cow. 284; s. c. 4 Wend. 100; *Pickstock v. Lyster*, 3 M. & S. 371; *Braddock v. Watson*, 9 Price, 6; *Stewart v. English*, 6 Ind. 176. Such delay is common to all the creditors, and is no more the subject of just complaint than the delay unavoidably incident to the extinguishment of claims against the estate of deceased debtors. Porter, J., in *Townsend v. Stearns*, 32 N. Y. 209, 213.

But when the delay, instead of being incidental, is the primary object to be accomplished by the creation of the trust, then the intent avoids the assignment. *Nicholson v. Leavitt*, 6 N. Y. 510, 517. And this will be the result even when the moral intention of the debtor is honest, as where he thinks it would be better, and that the property could be sold more advantageously for the interests of the creditors at a future time, and for this primary purpose executes an assignment. *Eyre v. Beebe*, 28 How. Pr. 333.

§ 222. *Intent to obtain time to effect a settlement.*—Whether the mere motive or expectation of the debtor in executing an assignment unaccompanied by an improper or suspicious act, and manifested by no objectionable clause in the assignment, will have the effect to vitiate the conveyance, may well be doubted. *Whedbee v. Stewart*, 40 Md. 414; Bump on Fraud. Convey. 2d ed. 349; see *Eyre v. Beebe*, 26 How. Pr. 333.

But in *Keteltas v. Wilson* (36 Barb. 298), where the debtor made an assignment with preferences in favor of bail and sureties, although it was admitted that the assignor had the legal right to prefer such liabilities, yet where it appeared that the preferences were given to produce delay and to enable the debtor to compromise with his creditors, it was held that the assignment was, for that reason, fraudulent and void. And in *Work v. Ellis* (50 Barb. 512), where the assignor testified, in effect, that his intention in making the assignment was to accomplish a settlement, and he was corroborated in his evidence by the assignee, this was regarded as conclusive evidence of an intent to hinder and delay creditors. But in *Griffin v. Marquardt* (21 N. Y. 121), where the assignor testified that he made the assignment for the purpose of gaining time to pay his creditors, and this testimony was relied on as showing conclusively a fraudulent intent to hinder and delay creditors, the court held that there was no force in the suggestion. Mr. Justice Wright said that if the assignor had testified unqualifiedly that his "sole purpose in making the assignment was to gain time to pay his creditors, it would not have been so conclusive in its nature as to have constrained the judge, regardless of all the other evidence, to find against the *bona fides* of the assignment." The

declaration was evidence to be weighed in determining the question of fraudulent intent.

§ 223. *Intent to defeat execution.*—The fact that an assignment is made with the intent to prevent the assignor's creditors from getting a preference by execution, does not tend to establish any fraudulent purpose. *Welles v. Marsh*, 30 N. Y. 344; *Hauselt v. Vilmar*, 2 Abb. N. C. 222; *Place v. Miller*, 6 Abb. Pr. N. S. 178; *Wilder v. Winne*, 6 Cow. 284; *Jackson v. Cornell*, 1 Sandf. Ch. 348. Nor will a threat to make an assignment, which is a threat to do a perfectly lawful act, furnish evidence of an intended fraudulent disposition of the property. *Dickerson v. Benham*, 12 Abb. Pr. 158; s. c. 20 How. Pr. 343; *Wilson v. Britton*, 6 Abb. Pr. 97; rev'g s. c. Ibid 34. But in *Gasherie v. Apple* (14 Abb. Pr. 64), where the debtor threatened that, if sued, he would make an assignment, and the plaintiff could not get anything, and he would do business under somebody else's name, it was held that the debtor had no right to attempt to coerce creditors into giving credit from fear of an assignment which should cut them off, and that an attempt to do so was evidence of fraudulent intent.

In this connection may properly be considered the effect of dilatory proceedings and efforts made by debtors to obtain time to execute an assignment before judgments can be recovered and executions issued against their property.

Thus, where a judgment had been taken against a firm by default, and they obtained a stay of proceedings on the ground that they had a good defense, and their attorney assured the plaintiffs that in the meantime the firm would make no assignment, but, pending the motion, they made an assignment giving preferences, and preventing the plaintiffs from realizing anything on their judgment, it was held that the assignment was void as against such judgment creditors, being made with intent to hinder and delay them. *Jacques v. Greenwood*, 12 Abb. Pr. 232. This case was distinguished by Sedgwick, J., in *Hauselt v. Vilmar* (2 Abb. N. C. 222, 227), and it was there decided that mere dilatory proceedings, although taken in view of an anticipated assignment, will not defeat a subsequent assignment executed in good faith.

§ 224. *Fraud on the part of the assignee.*—In determining the validity of an assignment made by a debtor, the intent of the assignor is the material consideration. Honesty of purpose in the assignee is not the test. *Wilson v. Forsyth*, 24 Barb. 105. And although the assignees are free from all imputation of participating in the fraudulent designs, and are themselves *bona fide* creditors of the assignor, and are to take the entire avails of the assigned property to pay their preferred debts, nevertheless, a fraudulent intent on the part of the assignors to hinder, delay or defraud creditors will render the assignment void. *Rathbun v. Platner*, 18 Barb. 272. This case is said to have been affirmed in the Court of Appeals. See *Peck v. Crouse*, 46 Barb. 151, 157. So, in *Cuyler v. McCartney* (40 N. Y. 221), it was said by Mr. Justice Woodruff, that if the intent was fraudulent, the assignees, however free from fraud themselves, are not *bona fide* purchasers, but are affected by the fraudulent intent of the assignor. And upon this point, see also *Griffin v. Marquardt*, 17 N. Y. 28; *Work v. Ellis*, 50 Barb. 512; *Mead v. Phillips*, 1 Sandf. Ch. 83; see also *Sands v. Hildreth*, 14 Johns. 493; *Waterbury v. Sturtevant*, 18 Wend. 353. And in *Putnam v. Hubbell* (42 N. Y. 106, 114), it is said that the intent of the assignors to hinder, delay and defraud creditors is enough to avoid the assignment as against them, irrespective of the intention of the assignees in accepting the trust or their good faith in its execution. The assignees are not to be regarded as purchasers, and the assignment cannot be sustained, if the intention of the assignors in making it was to defraud creditors, although the assignees acted with entire honesty and good faith. Voluntary assignments for creditors differ in this respect from conveyances to a vendee for value. In the latter case, although the vendor may make the transfer with the intent to hinder, delay and defraud creditors, that will not affect the title of the purchaser, unless he had previous notice of the fraudulent intent. *Ruhl v. Philips*, 48 N. Y. 125; rev'g 2 Daly, 45; *Jaeger v. Kelly*, 52 N. Y. 274; *Dudley v. Danforth*, 61 N. Y. 626.

§ 225. *Solvency of the assignor.*—Although a debtor assign all or a portion of his property when he believes himself to be solvent, this will not invalidate the instrument. *Ogden v.*

Peters, 21 N. Y. 23 ; s. c. 15 Barb. 560. An intent to hinder and delay creditors cannot be inferred from the solvency any more than from the insolvency of the debtor. The contrary doctrine, however, was maintained in *Van Nest v. Yoe*, 1 Sandf. Ch. 1 ; *Planck v. Schermerhorn*, 3 Barb. Ch. 644. In *Rokenbaugh v. Hubbell* (5 Law. Rep. N. S. 95 ; s. c. 15 Barb. 563, note), it was said that the true rule in such cases is, that a purpose to delay creditors would avoid an assignment when the sacrifice was sought to be prevented by the debtor himself, so as to enable him to realize something by way of a surplus or otherwise, but not where the sole and primary intent was to enable all the creditors to realize their entire demands, and prevent loss or injury to any one. It was also held in that case, that where a man has ample means to pay all his debts in cash, there can be no reason for making an assignment with preferences, except for the purpose of delaying creditors, and that such an assignment would be void. The case would be different, however, when a debtor has sufficient property to pay all his debts at its cash value, but is unable to pay in cash as his debts become due, and his property is in danger of being sacrificed by some of his creditors.

In the case of *Livermore v. Northrup* (44 N. Y. 107), Commissioner Leonard expressed the opinion that when the assets were clearly in excess of the liabilities of the debtor to a large extent, it might raise a presumption of an intent to hinder and delay creditors in the collection of their just demands, and amount to a *prima facie* case of fraud ; but in that case it was held that the facts warranted no such conclusion. And see remarks of Roosevelt, J., in *Ely v. Cook*, 18 Barb. 612, 614 ; *Johnson v. Rogers*, 15 N. B. R. 1, 2.

§ 226. *The fraud in the assignment must be at the time of its making.*—The assignment like every other instrument is good or bad at the time of its making. If it is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it. *Browning v. Hart*, 6 Barb. 91 ; and if it is invalid then, no subsequent act can give it validity. *Averill v. Loucks*, 6 Barb. 470.

“ You may doubtless,” says Mr. Justice Gould, in *Wilson v. Forsyth* (24 Barb. 105, 121), “ go outside of the mere naked

writing to show facts bearing on the question of fraudulent intent. But they are then nothing but evidence of what was the intent with which the writing was made. As, for instance, leaving the assignor in the possession and control of the assigned personal property ; this (unexplained) tends to show that the transfer was intended but as a cover ; and it is always proper evidence on the question of fraudulent intent in making the assignment. Here it is not the subsequent act that renders void the instrument, but the presumption, therefrom, of the prior intention ; an intention to give color of title to an assignee, to hinder creditors from interfering with the property ; and yet leaving the control, real disposal and benefit to the assignor." It is upon this principle that the immediate conduct of the assignees in taking or professing to take possession, their acts, when they find that the good faith of the assignment is questioned, and all like circumstances are permitted to go to the jury as parts of the *res gestæ*. *Cuyler v. McCartney*, 40 N. Y. 221. In *Pine v. Rickert* (21 Barb. 469), no inventory was made of the assigned goods, nor was there any list of creditors. The goods remained in the actual possession of the assignor. They were sold by him and his former clerks at private sale, and in the customary manner, by retail. His name was still upon the various signs of the store. Some of the goods were sold to pay an old debt not included in the first class. It did not appear that the assignee sold anything himself, nor did he give any reason for allowing the property to remain under the control of the assignor. It was held that these were most suspicious circumstances, and tended strongly to show that the whole transaction was for the purpose of defrauding the creditors of the assignor.

And in *Shepherd v. Hill* (6 Lans. 387), fraudulent acts of the assignee in disposing of the assigned property, were received as evidence establishing fraud in the execution of the assignment. And see *Waverly Bank v. Halsey*, 57 Barb. 249.

When, at the time of the execution of a general assignment, it was agreed between the assignor and assignees that they should lease all the assigned property to the wife of the assignor, which agreement was carried into effect, the assignees never taking possession of the property, but leaving it with the

assignor and his wife, it was held that the assignment was void as tending to hinder, delay and defraud creditors. *Dolson v. Kerr*, 5 Hun, 643.

So in *Nicholson v. Leavitt* (4 Sandf. 252, 273), it was assumed by Mr. Justice Duer, that if the assignment was executed upon the agreement and condition that the assignees were to employ the assignor, and pay him a salary out of the assigned property, this would have furnished evidence of fraud, as being a reservation out of the assigned property in favor of the assignor, but an employment of the assignor by the assignees after the assignment, which was no part of the agreement upon which the assignment was executed, could not furnish evidence of a fraudulent intent in making the conveyance.

§ 227. *Cotemporaneous acts*.—Cotemporaneous acts of the assignor, which are connected with the execution of the assignment, may be resorted to for the purpose of showing the intent with which the assignment was made. Thus, where the debtor sold all his property to his brother, a young man without family, experience or property resources, and who was employed as his clerk, upon a credit of one year; and afterwards executed a general assignment with preferences, it was held that the sale and assignment were to be regarded as one transaction, and that the circumstances afforded sufficient evidence of a fraudulent intent to justify an injunction and receiver. *Litchfield v. Pelton*, 6 Barb. 187. But a sale upon credit of part of their property, by an insolvent firm, while it is a circumstance which may be considered with others, bearing upon the question of fraudulent intent in an assignment subsequently made, does not necessarily establish it. And when the evidence shows that the property was sold upon a usual credit, to a person of undoubted responsibility, for all that it was reasonably worth, and that the debts preferred by the assignment were honestly owing, and nothing appeared but that there was other property of the insolvents not covered by the sale, the court will not overrule the finding of the referee, that the sale and assignment had not been made with intent to hinder, delay, or defraud creditors. *Roberts v. Shepard*, 2 Daly, 110.

And where certain creditors attacked a sale made by a firm

indebted to them, on the ground that it was fraudulent and void, an assignment previously made by one of the firm to his son, was admitted as evidence on the ground that it came within the rule in respect to evidence of cotemporaneous frauds. *Angrave v. Stone*, 48 Barb. 35; aff'g 25 How. 167.

In *Browning v. Hart* (6 Barb. 91), where a sale by an insolvent on credit, was followed shortly afterward by an assignment, the sale was declared void but the assignment was sustained.

And where a firm transferred its stock in trade and assets to a creditor, at a fair valuation, who agreed to dispose of the property and repay upon a fixed credit any surplus of the proceeds, after satisfying his claim, and subsequently the firm made a general assignment for the benefit of creditors, including four promissory notes given by the creditor who had previously received the goods, and the assignment preferred his claim, it was held that neither the original transfer nor the assignment were void against creditors or the firm, by their terms or the circumstances of their execution. *Loeschigk v. Baldwin*, 1 Robt. 377; aff'd in 38 N. Y. 326; see also *Lansing v. Woodworth*, 1 Sandf. Ch. 43.

And where the assignor, acting in concert with his son, who was one of the assignees, but without the knowledge of the other assignees, simultaneously with the making of the assignment, procured from certain of the creditors to whom a preference was given under the assignment agreements in writing, to lend to his son, one of the assignees, a large portion of the money that they should respectively receive upon their debts under the assignment, for the term of five years, such loan to be secured by the notes of the son indorsed by the assignor, and authorizing the assignee to pay to this son the sums so agreed to be loaned and take his receipt therefor, and the name of the son was used for the benefit of the assignor, and the agreement was in fact made between these creditors and the assignor, to enable the latter to prosecute business in the name of the son for his own benefit, and to use the money in such business, it was held that the inference was properly drawn from these facts that the assignment was made by the assignor with intent

to hinder, delay, and defraud his creditors. *Haydock v. Coope*, 53 N. Y. 68.

A further illustration of the same rule may be drawn from another class of cases. Thus, where a person, in failing circumstances, buys goods and shortly afterwards makes an assignment, giving preferences, in attacking the assignment as fraudulent, false representations made at the time of the purchase of the goods as to the settlement of former debts, and also statements as to the buyer's expectation of future ability to pay, are proper to submit to the jury on the question of fraud. *Byrd v. Hall*, 1 Abb. Dec. 285; s. c. 2 Keyes, 646; *Wilson v. Ferguson*, 10 How. Pr. 175.

But where a vendor, from whom goods have been obtained by fraud, instead of disaffirming the contract of sale, affirms it by bringing suit thereon and prosecuting it to judgment, neither he nor a receiver (who stands simply in the place of the judgment creditor), appointed in supplementary proceedings instituted upon such judgment, can set up the fraud in the sale for the purpose of defeating an assignment of the property made by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee. *Kennedy v. Thorp*, 51 N. Y. 174; rev'g 2 Daly, 258.

§ 228. *Subsequent acts of the assignor.*—All an assignor's acts connected with, or coincident in time with, his assignment, may generally be inquired into, because the law allows the greatest latitude in searching for evidence of a fraud which, from the nature of the case, must be confined almost exclusively within the assignor's bosom. Gould, J., in *Wilson v. Forsyth*, 24 Barb. 105, 128. But subsequent acts of the assignor, unconnected with the assignment, are wholly immaterial. Thus, where the assignor on absconding, after executing the assignment, carried off a sum of money with him, the assignment was not for that reason void. *Wilson v. Forsyth*, *supra*; see *Am. Ex. Bank v. Webb*, 15 How. Pr. 193.

And where the debtors executed an assignment on terms which would carry all their property, but omitted from the inventory a large amount of money which they intended to

fraudulently conceal and did conceal from their creditors and their assignee, it was held that this was rather a fraud on the assignment than a fraud in the assignment. *Miller v. Halsey*, 4 Abb. Pr. N. S. 28; see *Waverly Nat. Bank v. Halsey*, 57 Barb. 249; see *De Camp v. Marshall*, 2 Abb. Pr. N. S. 373.

Where it appeared that the assignor continued in possession of the assigned property, and was employed by the assignee to sell the stock, and assist in making collections at the store where the business was formerly carried on, and the amounts so collected were paid over to the assignee; that this continued about six months, when the whole remaining stock was sold at 25 per cent. on the cost price to a brother-in-law of the assignor, who had paid a large portion of the purchase money, and was fully responsible for the balance, the sale having been made for the full value of the goods, it was held, that in an action to set aside the assignment for fraud, there was not sufficient evidence of fraud to warrant an injunction and receiver. *Beamish v. Conant*, 24 How Pr. 94.

Subsequent acts of the assignor, and the control which he exercises over the assigned property, may prove of importance (*Persse v. Willett*, 1 Robt., 131), but only in so far as they may be legitimately referred back to the time of the execution of the assignment, and serve to establish the intent of the assignor at that time (*ante*, § 226). This distinction is an important one. The assignor does not lose all interest in the assigned property by the execution of the assignment. He still retains an equitable interest in what may remain after payment of the debts provided for, and in seeing to it that the property be made available for the payment of his debts. *Billings Case*, 10 Abb. Pr. 258; s. c. 24 How. Pr. 448; *Dickenson v. Benham*, 12 Abb. Pr. 158; s. c. 20 How. Pr. 343. And this interest will give him a standing in court to move to vacate an attachment previously granted against him (*Dickenson v. Benham*, *supra*). This interest of the assignor will justify him in all proper efforts to assist in making the property realize the utmost.

"It is not," says Mr. Justice Clark, in *Eyre v. Beebe* (28 How. Pr. 333, 337), "every kind of interference by an assignor with the trust property indicates a fraudulent intent. Every insolvent debtor has at least a moral interest in the advantageous

disposition of the property, in order that it may go as far as possible in the payment of his debts and the satisfaction of his creditors; and, therefore, any suggestion offered by him which may be useful to the trustee and beneficial to the creditors, so far from showing that he intended by the assignment to defraud his creditors, indicates that he was actuated by good motives from the beginning, if we can at all ascertain a past intent by subsequent conduct."

§ 229. *Subsequent acts of the assignee.*—Where the assignment has been honestly made for a lawful purpose, it cannot be defeated by proof that the assignee has abused his trust, misappropriated the property, or acted dishonestly in its disposal. *Cuyler v. McCartney*, 40 N. Y. 221; s. c. 33 Barb. 165; *Hotop v. Durant*, 6 Abb. Pr. 371 note; *Mathews v. Poultney*, 33 Barb. 127; *Wilson v. Forsyth*, 24 Id. 105; *Hardmann v. Bowen*, 39 N. Y. 196; *Casey v. Janes*, 37 Id. 608; *Browning v. Hart*, 6 Barb. 91; *Cox v. Platt*, 32 Id. 126; *Pac. Mut. Ins. Co. v. Machado*, 16 Abb. Pr. 451; *Am. Ex. Bank v. Webb*, 15 How. Pr. 193. Thus an unauthorized act of the assignee in selling on credit a part of the assigned property cannot make void an assignment which was valid when made. *Mathews v. Poultney*, *supra*.

But the subsequent acts of the assignee, under the principles discussed in the previous sections, may furnish important evidence of the fraudulent intent of the assignor when these acts can be connected with previous matters showing that the entire transaction, including the assignment, was one.

In *Dambmann v. Butterfield* (9 Supm. Ct. [2 Hun], 284), where the action was to set aside an assignment as fraudulent, on the ground that a preferred debt was fictitious, the question arose whether upon an examination of the assignee he could be compelled to state what disposition had been made by him of a portion of the assets.

In delivering the opinion of the court, Mr. Justice Davis said: "It may be true that a valid assignment is not avoidable by the subsequent fraud or misconduct of the assignee; but where the issue is upon the validity of the instrument itself for fraud, it is competent to show the disposition of the assigned

property by the assignee, as tending to throw light upon the alleged invalidity of the assignment. Especially is this so where the fraud alleged is that the preferences to the assignee are of fictitious debts, or of debts that have been wholly or in part paid."

§ 230. *Evidence of intent*.—A person is presumed to intend the necessary consequences of his own acts; and when the necessary result of an assignment, as shown by unlawful provisions on its face or by undisputed facts determined by extrinsic evidence, is to hinder, delay, and defraud creditors, the debtor will be charged with the intent to effect the result which necessarily follows such illegal provisions or facts. *Kavanagh v. Beckwith*, 44 Barb. 192; *Webb v. Daggett*, 2 Barb. 9.

While this is true, it is also to be remembered that fraud is never to be presumed, but is to be proved. *Sullivan v. Warren*, 43 How. Pr. 188; *Nichols v. Pinner*, 18 N. Y. 295.

When conveyances are attacked for fraud, and there are many facts surrounding the case which cast suspicion upon the transaction, the defendants should be prepared to meet the allegations of unfairness; and if they fail to do so, the plaintiff will be entitled to the benefit of all the unfavorable inferences which may legitimately be drawn from their neglect and the general features of the case. *Newman v. Cordell*, 43 Barb. 448.

An assignor who is a witness in a issue of fact as to whether an assignment or transfer of property was made to hinder, delay or defraud creditors, may be asked whether in making the assignment or transfer he intended to delay or defraud his creditors. *Seymour v. Wilson*, 14 N. Y. 567; *Forbes v. Waller*, 25 N. Y. 430; *Mathews v. Poultney*, 33 Barb. 127; *Persse & Brooks' Paper Works v. Willett*, 1 Robt. 131; s. c. 19 Abb. Pr. 416; *Bedell v. Chase*, 34 N. Y. 386.

But evidence to show that there was no agreement at the time of the assignment that the assignor should retain possession of the assigned property, is not competent. The assignment speaks for itself, and must be judged by its terms and in the light of the contemporaneous and subsequent acts of the parties. *Forbes v. Waller*, 25 N. Y. 430.

In the case last cited, Mr. Justice Allen says: "The use that was made of the assignment, and the acts of the parties

under it, must furnish the data to judge of the intent and motives with which it was executed. The assignee cannot give evidence of agreements not contained in the assignment to uphold it or change its legal effect. In terms, the assignment gave the assignee the right of immediate possession; and whether he exercised that right reasonably was a fact to be established by evidence like other facts, and not by evidence of what the parties to the instrument privately agreed should or should not be done." *Forbes v. Waller*, 25 N. Y. 430.

Declarations of the assignors of goods, made subsequent to the assignment and after they have parted with the possession of the assigned property, are not competent evidence for defendants when sued by the assignees for taking and selling the goods under and by virtue of a judgment and execution against the assignors. *Peck v. Crouse*, 46 Barb. 151; *Ball v. Loomis*, 29 N. Y. 412; *Bullis v. Montgomery*, 50 N. Y. 352; *Cuyler v. McCartney*, 40 N. Y. 221.

Where the assignor continues in possession of the assigned property, his acts and declarations while in actual possession may be given in evidence as part of the *res gestæ*. *Newlin v. Lyon*, 49 N. Y. 661; *Adams v. Davidson*, 10 N. Y. 309. See this case commented on in *Cuyler v. McCartney*, 40 N. Y. 221.

If it be proved as a fact in the case that the assignor and assignees were in a conspiracy to defraud the creditors, then the acts and declarations of either, made in execution of the common purpose and in aid of its fulfillment, are competent against any of the parties. But the existence of such conspiracy must be established, as against the assignee, by evidence independent of any declaration and acts of the assignor subsequent to the assignment, and such declarations and acts cannot properly be used in addition to the other evidence, when not sufficiently clear without it, to establish that fact. *Cuyler v. McCartney*, 40 N. Y. 221; *Newlin v. Lyon*, 49 N. Y. 661; see *Waterbury v. Sturtevant*, 18 Wend. 353; *Sprague v. Kneeland*, 12 Wend. 161.

§ 231. *Delivery of possession.*—The Revised Statutes provide that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of

goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers." 2 R. S. 136, § 5; 3 R. S. 6th ed. 143, § 5.

Under the provisions of the statute, unless an assignment be accompanied by an immediate delivery of the assigned property, and be followed by an actual and continued change of possession, the courts are bound to presume it fraudulent and void as against creditors, and to regard it as conclusively so, unless satisfied that it was made in good faith, and without any intent to defraud. *Connah v. Sedgwick*, 1 Barb. 210; *Ball v. Loomis*, 29 N. Y. 412; *Van Buskirk v. Warren*, 2 Keyes, 119; s. c. 4 Abb. Dec. 457; *Terry v. Butler*, 43 Barb. 395; *Russell v. Lasher*, 4 Barb. 232; *Griswold v. Sheldon*, 4 N. Y. 581; *Dewey v. Adams*, 4 Edw. 21; *Currie v. Hart*, 2 Sandf. Ch. 353; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Hitchcock v. St. John*, Hoffm. Ch. 511; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Fiedler v. Day*, Id. 594.

And there must be an actual and continued change of possession as well as a nominal and constructive change, or the transaction will be fraudulent as against creditors. *Currie v. Hart*, 2 Sandf. Ch. 353; *Miller v. Halsey*, 4 Abb. Pr. N. S. 28; *Waverly Nat. Bank v. Halsey*, 57 Barb. 249.

If a debtor assign his property to one of his creditors, and acting as the creditor's agent retain the possession and retail the goods without any visible change in the mode of doing business, receiving compensation for his services, this is not a change of possession within the statute. *Butler v. Stoddard*, 7 Pai. 163; aff'd. in 20 Wend. 507; *Wilson v. Ferguson*, 10 How. Pr. 175.

So where a debtor assigned a stock of merchandise in trust for his creditors, and after a mere symbolical delivery the

assignee permitted the assignor and his clerk to continue in possession of the goods, selling them as before the assignment, and apparently for the benefit of the assignor, it was held that these facts unexplained were evidence that the assignment was made in fraud of creditors. *Adams v. Davidson*, 10 N. Y. 309; see also *Pine v. Rikert*, 21 Barb. 469.

But if the delivery by the assignor be sufficient, it is not necessary that the property should be removed from the place of delivery. *Hitchcock v. St. John*, Hoffm. Ch. 511.

And the circumstance that the assignee constitutes the assignor his agent, is not alone sufficient to show that the assignment was made with fraudulent intent, especially when it appears that the assignee was not familiar with the business, and that he had confidence in the assignor, who was familiar with it. *Wilbur v. Fradenburgh*, 52 Barb. 474.

And the fact that the assignee employs the same clerks that were previously employed by the assignor is not evidence of fraud. *Parker v. Jervis*, 3 Abb. Dec. 449.

Where, at the time of executing the assignment, the assignor delivered to the assignee the keys of the store for the purpose of giving him dominion over the property, and the former clerks were discharged by the assignor, and all again employed by the assignee to take charge of and remain with the goods of the assignee, and they did so take charge of the goods and hold them for the assignee and in their actual possession, and the assignee at the same time took the books, the notes and accounts from the store to his office, and the signs were taken down—this evidence was regarded as showing a fair case of delivery of the goods, and a continued change of possession under the assignment. *Parker v. Jervis*, *supra*.

It is not an unqualified rule of law that there must be an actual and continued change of possession in order to shield the transaction from the imputation of fraud. A continued possession of the assignor is presumptive evidence of fraud, and conclusive unless rebutted, but it may be shown to be consistent with good faith and to have been free from fraud. *Smith v. Acker*, 23 Wend. 653; *Ball v. Loomis*, 29 N. Y. 412; *Van Buskirk v. Warren*, 4 Abb. Dec. 457; s. c. 2 Keyes, 119; *Hall v. Tuttle*, 8 Wend. 375.

Although, generally, it is a badge of fraud if the assignor continue in possession of the whole, or even a part of the assigned property, yet where there is no inventory of the property assigned accompanying the assignment, the assignor's retaining some property that he might have assigned, or that being covered by the general terms of the assignment he might have delivered under it, is not an act that will make the whole assignment void of course. *Wilson v. Forsyth*, 24 Barb. 105.

Where an assignment was made in good faith, and the assignor continued in possession of the assigned property at the request and for the benefit of his assignees, who had used reasonable diligence to get the possession, it was held, previous to the Revised Statutes, that the assignment was not fraudulent; that the possession of the assignor, under the circumstances, was not material, and was consistent with the real intent of the assignment. *Vredenburg v. White*, 1 Johns. Cas. 156.

Real estate is not included in the express language of the statute.

The continuance in possession of a grantor of real estate, after the conveyance, while it may be a circumstance proper to be considered, in connection with other evidence, tending to show a design to defraud creditors, does not of itself warrant a finding as a legal conclusion, that the deed was fraudulent. *Clute v. Newkirk*, 46 N. Y. 684; *Every v. Edgerton*, 7 Wend. 259; see *Jackson v. Cornell*, 1 Sandf. Ch. 348.

But where the debtor was permitted to retain possession of real estate which he had assigned, for a number of years under a nominal lease to his son, without paying any rent, the conveyance was declared fraudulent and void as against creditors. *Bank of Orange Co. v. Fink*, 7 Paige, 87; see *Mead v. Phillips*, 1 Sandf. Ch. 83; *Dolson v. Kerr*, 12 Supm. Ct. (5 Hun), 643; *Hitchcock v. St. John*, Hoffm. Ch. 511. And in the case of *Dewey v. Adams* (4 Edw. Ch. 21), an assignment was declared void because the assignees left furniture, embraced by it, in the assignor's possession, renting it to him until a favorable time for sale.

The property need not be taken into the manual possession of the assignee. If it comes under his actual custody and control it will be enough, although the delivery be merely symbolical or constructive. Thus a delivery of the keys of the

place where the goods are stored may be sufficient to pass a valid title to the property. *Bullis v. Montgomery*, 50 N. Y. 352. So in an early case, where an assignment of household goods was made, and a silver cup was delivered to the assignee in token of delivery, and he proceeded to advertise the goods for sale, but left the bulk of them in the possession of the assignor. The assignment was held valid. *Vredenberg v. White*, 1 Johns. Cas. 156. This decision was made previous to the Revised Statutes (2 R. S. 136), and the rule of law is now more stringent. In *Hitchcock v. St. John* (Hoffm. Ch. 511), it was said that a symbolical delivery of a small portion of the property will not be sufficient. And in *Mead v. Phillips* (1 Sandf. Ch. 83), Vice chancellor Sandford said: "I need not determine whether the omission to deliver a small portion of the assigned property (in this instance it was about one-third) would be a badge of fraud, when the assignee is shown to have taken the immediate possession of the residue, and to have continued in the possession thereof; the assignment being shown to have been made in good faith in all other respects. The want of an immediate and continued change of the possession of a material or substantial portion of the assigned property, renders it imperative for the party supporting the validity of the transaction to prove that it was executed *in good faith, and without any intent* to defraud."

But a failure to comply with the statute in reference to a delivery and change of possession of the assigned property is an objection which can be taken only by creditors. The fact that assignees, immediately after the acceptance of the assignment, refused to take possession of the entire property, does not deprive them of their rights, nor relieve them of their obligations under it. *Sheldon v. Stryker*, 42 Barb. 284; s. c. 27 How. 387.

§ 232. *Fictitious and fraudulent debts.*—An assignment by an insolvent debtor which undertakes to provide for the payment of debts not owing by the assignor, or for amounts in excess of sums justly due by him, is fraudulent and void, for the manifest reason that the provision for such fictitious debts must have the effect either to defraud the *bona fide* creditors of the assignor, or to delay and embarrass them in the collection of

their debts. *Webb v. Daggett*, 2 Barb. 9; *De Camp v. Marshall*, 2 Abb. Pr. N. S. 373; *Fiedler v. Day*, 2 Sand. 594; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Terry v. Butler*, 35 Barb. 395; *Jacobs v. Remsen*, 36 N. Y. 668; *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Am. Ex. Bank v. Webb*, 36 Barb. 291; see *Dambmann v. Butterfield*, 9 Supm. Ct. (2 Hun), 284.

In *Kavanagh v. Beckwith* (44 Barb. 192), where certain debts were overstated in the assignment, but the assignor filed an inventory, under the statute, containing the true amounts of these debts, the court held that, upon a fair construction of the language of the assignment and the subsequent inventory, the overstatement of the amounts did not render the assignment fraudulent.

But a debt is not necessarily fictitious or fraudulent because the debtor has a good defence to it, of which he might avail himself if he so desired. Thus a debtor may provide for the payment of usurious debts. *Murray v. Judson*, 9 N. Y. 73; *Pratt v. Adams*, 7 Paige, 615; *Green v. Morse*, 4 Barb. 332. A debtor is not required to avail himself of the statutes against usury to avoid the payment of a debt justly due; and he may properly provide in an assignment for the payment of any debt which he himself might rightfully pay. *Murray v. Judson*, *supra*. The same rule and the same reason exists in reference to provisions for the payment of debts barred by the statute of limitations. *Livermore v. Northrop*, 44 N. Y. 107.

§ 233. *Assignment when fraudulent in bankruptcy.*—Under the operation of the late bankrupt law, it was determined that a general assignment, executed in good faith and for the equal benefit of all creditors, and in conformity with the law of the State where it was made, was not fraudulent and void, but at most was voidable only by the assignee in bankruptcy in proceedings instituted by him within the time and in the manner provided in the bankrupt law. *Meyer v. Hellman*, 91 U. S. (1 Otto), 496; *in re Kimball*, 16 N. B. R. 188. And the Supreme Court of the United States decided in the case first cited that the assignee, under the common law assignment, would not be required to surrender the estate to the bankruptcy assignee when the proceedings in bankruptcy were not instituted within

six (now three) months after the execution of the assignment, pursuant to R. S. U. S. § 5130. In this State, in the case of *Haas v. O'Brien* (66 N. Y. 597; s. c. 52 How. Pr. 27; 16 N. B. R. 507), where the proceedings in bankruptcy were instituted within six months after the making of the assignment, in an action brought by the assignee in bankruptcy to set aside the assignment, it having been admitted that the assignment was executed in good faith and without any intent to defeat the object of the bankrupt law, the court held the assignment valid as against the assignee in bankruptcy. And this case was followed and relied upon in *Van Hein v. Elkus* (15 Supm. Ct. [8 Hun], 516.

And where no proceedings in bankruptcy have been instituted against a debtor who has made an assignment in conformity with the laws of this State, there was held to be nothing in the existences of the bankrupt law, or any provision contained in it, which rendered such an assignment void. *Thrasher v. Bentley*, 1 Abb. N. C. 39; less fully, 59 N. Y. 649; *Syracuse, &c. R. R. Co. v. Collins*, 1 Abb. N. C. 47; less fully, 57 N. Y. 641.

In the case of *Dolson v. Kerr* (52 How. Pr. 481; s. c. 16 N. B. R. 405), it seems to have been assumed that the State assignee had made a voluntary surrender to the bankruptcy assignee, and the principal point upon which that case was decided has been since overruled in *In re Biesenthal* (15 N. B. R. 228).

In *Bostwick v. Bennett* (18 Supm. Ct. [11 Hun], 301), which was an action brought by an assignee to recover against the sheriff for a seizure of property conveyed under an assignment for creditors, the sheriff defended on the ground that the assignment was invalid, because made in contemplation of insolvency and containing preferences, and therefore void under the provisions of the bankrupt act. The Supreme Court at general term (second department) sustained the defense. This decision appears to be open to question. The assignment does not appear to have been void as to the sheriff. It was void only under the provisions of the bankrupt law, and as against the assignee in bankruptcy. *Seaman v. Stoughton*, 3 Barb. Ch. 344, 349; *Dodge v. Sheldon*, 6 Hill 9; *Freeman v. Deming*, 3 Sandf. Ch. 327; see *Allen v. Montgomery*, 10 N. B. R. 503.

But in an action by the assignee in bankruptcy appointed in proceedings instituted within the time limited, an assignment for the benefit of creditors, although made for the equal benefit of all creditors, will be set aside. Such a conveyance is held by the bankruptcy courts to be conclusive evidence of an intent to defeat the operation of the bankrupt act. *Globe Ins. Co. v. Cleveland Ins. Co.* 14 N. B. R. 311; *Jackson v. McCulloch*, 13 Id. 283; *Barnwell v. Jones*, 14 Id. 278; *Macdonald v. Moore*, 15 Id. 26; *in re Biesenthal*, Id. 228; *in re Temple*, 17 N. B. R. 345; *Rettew v. Barnes*, 8 Phila. 133.

Until the general assignment is set aside as against the assignee in bankruptcy, the title to the assigned property remains in the assignee under the general assignment. *Belden v. Smith*, 16 N. B. R. 302.

§ 234. *Levy after assignment and before bankruptcy.*—When judgment creditors levy executions upon the assigned property after the execution of the assignment and before proceedings are instituted in bankruptcy, and the assignment is subsequently set aside at the suit of the assignee in bankruptcy, the levy does not become a lien upon the property as against the assignee in bankruptcy. *In re Biesenthal*, 15 N. B. R. 228; *Johnson v. Rogers*, 15 N. B. R. 1; *in re Walker*, 18 N. B. R. 56; *Belden v. Smith*, 16 N. B. R. 302; *contra*, *Macdonald v. Moore*, 15 N. B. R. 26.

But where, after the assignment, but before the commencement of the proceedings in bankruptcy, the sheriff levied upon and sold the assigned property, and the voluntary assignee thereupon sued the sheriff for trespass, and he defended on the ground that the assignment was fraudulent and void, and obtained a judgment in his favor, it was held that the assignee in bankruptcy was bound by the judgment as being in privity with the sheriff, and that the property was bound by the prior lien of the execution. *In re Biesenthal*, 18 N. B. R. 120.

§ 235. *Protection of State assignee in bankruptcy.*—The State assignee is protected even in the bankrupt court, when the assignment is set aside, to the amount of his expenses and reasonable commissions. *Macdonald v. Moore*, 15 N. B. R.

26; *in re Pierce v. Holbrook*, 3 Id. 258; see *Catlin v. Foster*, 3 Id. 540; *in re Cohn*, 6 Id. 379; *in re Stubbs*, 4 Id. 376; *Burkholder v. Stump*, 4 Id. 597; *Clark v. Marx*, 6 Ben. 275; *in re Lains*, 16 Id. 168.

But it has recently been held that although the necessary expenses of administering the estate while in his hands will be allowed to the State assignee, yet he will not be allowed compensation for his own services except in a case where it is clear that the estate will not be subjected to a double expense. *In re Kurth*, 17 N. B. R. 573.

§ 236. *Assignments fraudulent as against proceedings under the non-imprisonment act.*—A debtor can not, by executing a general assignment, defeat the priority of creditors who have instituted regular and valid proceedings against him under the “non-imprisonment act” (Laws of 1831, chap. 396). Thus, while proceedings were pending against the debtor under that act, he executed a general assignment of all his property for the benefit of all his creditors without preference. On a bill filed by the creditor who had instituted the proceedings to set aside the assignment, it was held that the assignment was a fraud upon the law, and the assignee under the general assignment was held to be a trustee for the creditors to the extent of their debt. *Spear v. Wardell*, 1 N. Y. 144; *Hall v. Kellogg*, 12 N. Y. 325; *Wood v. Bolard*, 8 Paige, 556; see *Matter of Hurst*, 7 Wend. 239.

CHAPTER XVI.

PROCEEDINGS OF CREDITORS TO AVOID THE ASSIGNMENT.

§ 237. *In general.*—Where the assignment is fraudulent and void as against creditors, they have their election either to regard it as a nullity and proceed to the enforcement of their claims by legal process against the assigned property, or they may resort to an action to have the assignment declared fraudulent and void as to them; or, in certain cases, they may proceed by attachment under the provisions of the Code of Civil Procedure. These proceedings on the part of creditors to satisfy their claims out of the assigned property are the subject of consideration in the present chapter.

§ 238. *Creditors who assent.*—It is not all creditors who may assail the assignment. An assignment, even though void as to creditors who choose to disaffirm it, is valid as to those creditors who are provided for in it, and who think proper to insist upon their rights against the assignee. *Mills v. Argall*, 6 Paige, 577; *Hone v. Henriquez*, 13 Wend. 240; affi'g 2 Edw. 120; *Pratt v. Adams*, 7 Paige, 615. Thus a person who by his bill claims a beneficial interest under an assignment without alleging it to be fraudulent, cannot be permitted at the hearing to claim relief on the ground that the assignment is proved to be fraudulent. *Ontario Bank v. Root*, 3 Paige, 478; *Rome Exch. Bank v. Eames*, 4 Abb. Dec. 83; s. c. 1 Keyes, 588; *Jewett v. Woodward*, 1 Edw. 195. So if a creditor, with knowledge that an assignment by his debtor is fraudulent in law upon its face, enter into an agreement with the debtor and the trustees named in the assignment for the management of the trust property—the performance of such agreement having been entered upon—he is precluded from impeaching the as-

signment for such patent defect. *Rapalee v. Stewart*, 27 N. Y. 310.

Where a creditor under an assignment which is liable to be defeated for fraud, takes a dividend, he cannot afterwards avoid the assignment without, at least, restoring the dividend to the assignee. *Ex parte Freeman*, 4 Ves. 836 ; *Ex parte Grosvenor*, 14 Ves. 587 ; *Wells v. Munro*, cited in *Babcock v. Dill*, 43 Barb. 577. But when the partner of a creditor had received a payment on account of his debt from the assignee, but he had been informed that the creditors were all to share alike under the assignment, and he was ignorant of the fraudulent circumstances connected with it, it was held that he was not by such receipt precluded from setting aside the assignment for fraud. *Van Nest v. Yoe*, 1 Sandf. Ch. 4.

And when the creditors were consulted by the assignors before the assignment was executed, and were cognizant of the financial condition of the assignors, and assented to the plan of making a general assignment, and, after it was executed, discontinued actions which they were prosecuting for the recovery of their debts, in conformity to an understanding between the assignor's other creditors and themselves that they would thus discontinue if the assignment should be made, it was held that, having concurred in the execution of the assignment, they could not be heard to allege that it was fraudulent, because of facts of which they were fully informed when they gave their assent. *Johnson v. Rogers*, 15 N. B. R. 1.

But the mere fact that a creditor purchases a portion of the assigned property from the assignee does not preclude him from insisting that the assignment is void. *Haydock v. Coope*, 53 N. Y. 68 ; see *Palmer v. Smith*, 10 N. Y. 303.

In the case of the *American Exch. Bank v. Webb* (36 Barb. 291), where, after the execution of an assignment which was fraudulent and void as against creditors, the wife of the assignor entered into an arrangement with the assignee, by which she agreed to release her dower upon condition that, if the assignment was held valid, she should receive the amount provided for her under the assignment, and if invalid, that she should have her dower out of the proceeds, and the plaintiff assented to these terms, it was held that there was nothing in

these facts which should prevent the plaintiff from maintaining an action to set aside the assignment as fraudulent.

§ 239. *Creditors who are not injured*.—A creditor cannot avoid an assignment because it is illegal if it benefits instead of injures him. *Fox v. Heath*, 16 Abb. Pr. 163; see *Mosely v. Mosely*, 15 N. Y. 334; *Fort Stanwix Bank v. Leggett*, 51 N. Y. 552. No creditor but the one who is hindered, delayed or defrauded by the particular provision complained of, can avoid the instrument on that account. Thus, where a general assignment by a partnership gives preference to the payment of the partnership debts, a creditor of the partnership cannot have the assignment set aside as void, because its provisions as to the subsequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. *Morrison v. Atwell*, 9 Bosw. 503; *Scott v. Guthrie*, 10 Bosw. 408; *Powers v. Graydon*, Id. 630.

§ 240. *Proceedings by attachment*.—It seems to be now settled that the sheriff may attach personal chattels covered by an alleged fraudulent assignment, but in such a case he must defend the seizure on behalf of the creditors, and show that the assignment was fraudulent as to the attaching creditor's debt. *Rinchev v. Stryker*, 28 N. Y. 45; s. c. 26 How. Pr. 75; 31 N. Y. 140; *Hall v. Stryker*, 27 N. Y. 596; rev'g 29 Barb. 105; s. c. 9 Abb. Pr. 342; *Jacobs v. Remsen*, 12 Abb. Pr. 390; s. c. 35 Barb. 384; affi'd 36 N. Y. 668; see *Frost v. Mott*, 34 N. Y. 253; *Kelly v. Lane*, 42 Barb. 694; s. c. 28 How. Pr. 128; *Schlussel v. Willit*, 12 Abb. Pr. 397; *Skinner v. Oettinger*, 14 Abb. Pr. 109. But where the assigned property has been sold by the assignees, and its identity gone, the proceeds cannot be attached or levied upon by the sheriff, as the debtor's property. *Lawrence v. Bank of the Republic*, 35 N. Y. 320; *Matter of True*, 4 Abb. N. C. 90; *Lanning v. Streeter*, 57 Barb. 33; *Campbell v. Erie R. R. Co.* 46 Id. 540; *Greenleaf v. Mumford*, 50 Id. 543; s. c. 35 How. Pr. 148; *McElwain v. Willis*, 9 Wend. 569. In such a case the avails of the assigned property are held by the assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of

a creditor's bill, which a sheriff cannot maintain. *Johnson, J., in Lanning v. Streeter, supra*, 44. Debts and choses in action are to be regarded as legal assets under the attachment laws whenever that process acts directly upon the legal title, but whenever they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they must be treated as equitable assets only, which cannot be reached by attachment. *Thurber v. Blanck*, 50 N. Y. 80; *contra, Me. & Trader's Bank v. Dakin*, 51 N. Y. 519 (Com. of App.); *Heye v. Bolles*, 33 How. Pr. 30; s. c. 2 Daly, 231.

Where an application is made for an attachment on the ground of a fraudulent conveyance of property under a general assignment, it is not competent for the plaintiff to show in support of the attachment, an omission to do any act required to be done under the statute to render the assignment valid, or the fact that the assigned property was partnership property, and one of the partners has not joined in the assignment, or any fact establishing the invalidity of the assignment, except so far as it bears upon the question of fraudulent intent in making the assignment. *Place v. Miller*, 6 Abb. Pr. N. S. 178. Nor will the fact that the assignee has taken possession of property under an assignment and is removing it, and that no assignment has been filed in the clerk's office as required by the statute, be of itself alone sufficient evidence to sustain an attachment on the ground that the assignment is fraudulent. *Denzer v. Munday*, 5 Robt. 636.

Where a debtor threatened that if his creditors brought action against him, "he would make an assignment, and plaintiff (a creditor) could not get anything, and he would do business under somebody else's name," and on this threat plaintiff obtained an attachment, which defendant moved to vacate, setting forth in his affidavit that he had sufficient property to pay all his creditors, it was held that this was evidence of defendant's intention to defraud his creditors. *Gasherie v. Apple*, 14 Abb. 64.

§ 241. *Proceedings by execution.*—Where an assignment is void, as against a statute, and where a creditor takes the property on execution, which that assignment intended to convey, he takes no *residuum*, nor equitable interest of the assignors,

but he takes property belonging to his debtors, the title of which never passed from them to their assignees, and though the effect of this is to give one of the creditors an entire satisfaction of his debt, while others equally meritorious may go either wholly or partially unpaid, yet the law serves those who are vigilant, and the creditor who has first obtained judgment and execution, reaps the fruits of his vigilance. *Austin v. Bell*, 20 Johns. 442.

§ 242. *Proceedings by creditors in equity.*—The rules which in general apply to actions in equity brought by creditors to reach the property of their debtor fraudulently conveyed, are those which apply to actions to set aside fraudulent assignments. None but judgment creditors, with the exceptions hereafter mentioned, can maintain such an action. A mere creditor at large cannot bring an action to reach property of his debtor which has been fraudulently assigned. *Neustadt v. Joel*, 2 Duer 530; aff'd as *Reubens v. Joel*, 13 N. Y. 488; *Andrews v. Durant*, 18 N. Y. 496; *Coope v. Bowles*, 18 Abb. Pr. 442; s. c. 28 How. Pr. 10; 42 Barb. 87; *Willitts v. Vandenburg*, 34 Barb. 424; *Cropsey v. McKinney*, 30 Barb. 47; *Hastings v. Belknap*, 1 Den. 190.

There are two forms of action to which a judgment creditor may resort.¹ If having issued an execution upon his judgment, a valid levy has been made thereon upon real or personal property of the debtor, subject to levy, which has been fraudulently

¹ There are two classes of cases where a plaintiff is permitted to come into a court of equity for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction, fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. In the first case the plaintiff may come into this court for relief immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and the obstruction being removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors or *bona fide* purchasers. Chan. Walworth, in *Beck v. Burdett*, 1 Paige, 305, 308.

assigned by the debtor, the creditor may bring an action in aid of the execution to enforce the lien of his execution and to remove the obstruction to his legal remedy occasioned by the fraudulent assignment. *Beck v. Burdett*, 1 Paige, 305, 308; *Mohawk Bank v. Atwater*, 2 Id. 54; *Chautauqua Co. Bank v. White*, 6 N. Y. 236, 252, 530; *Bishop v. Halsey*, 3 Abb. Pr. 400; *McElwain v. Willis*, 9 Wend. 548; *Crippen v. Hudson*, 13 N. Y. 161, 166; *Parshall v. Tillou*, 13 How. Pr. 7; *Shaw v. Dwight*, 27 N. Y. 244, 247; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; see *Fox v. Moyer*, 54 N. Y. 125; *Payne v. Sheldon*, 63 Barb. 169, 173.

But when the subject sought to be reached is choses in action, an execution returned is necessary by the express provision of the statute. 2 R. S. 174; *Bishop v. Halsey*, 3 Abb. Pr. 400; *Shaw v. Dwight*, 27 N. Y. 244, 249.

If the property sought to be reached is real estate, the creditor's lien is perfected by the docketing of [the judgment; and it has been held that in that case the creditor may resort to his action to have a fraudulent conveyance which prejudices his lien removed, without resorting in the first instance to an execution and awaiting its return unsatisfied. In that case, however, the creditor must allege in his pleading, and, if denied, prove on the trial, that there is not sufficient other property liable to sale on execution out of which to satisfy the judgment. *Payne v. Sheldon*, 63 Barb. 169; *Brinkerhoff v. Brown*, 4 John. Ch. 671.

§ 243. *Proceedings by creditor's bill.*—The ordinary form of action to which creditors resort to obtain satisfaction of their demands out of the assigned property, is a creditor's bill under the provisions of the Revised Statutes (2 R. S. 174, § 38), and the general rules of courts of equity. In such an action all species of property, whether real or personal, legal or equitable, may be reached and applied to the satisfaction of the plaintiff's claim.

In order to maintain an action in the nature of a creditor's bill, it is essential that the plaintiff should first have exhausted his remedy at law, and this must be shown by a return of an execution unsatisfied. *Andrews v. Durant*, 18 N. Y. 496;

Knauth v. Bassett, 34 Barb. 31; *Wilson v. Forsyth*, 24 Barb. 105; *Hastings v. Belknap*, 1 Den. 190; *Willetts v. Vanderburgh*, 34 Barb. 424. And the action may be commenced as soon as the execution is returned, whether before or after the lapse of the sixty days allowed by statute for the sheriff to make his return. *Knauth v. Bassett*, 34 Barb. 31; *Billhofer v. Heubach*, 15 Abb. Pr. 143; *Renaud v. O'Brien*, 35 N. Y. 99; see *Forbes v. Waller*, 25 N. Y. 430.

A receiver appointed under supplementary proceedings may, after perfecting his appointment, maintain an action in his own name to set aside an assignment of real and personal property made by a judgment debtor, on the ground of fraud, without having first received from such debtor an assignment to himself as such receiver. *Porter v. Williams*, 9 N. Y. 142 (1853).

The appointment of the receiver does not vest him with the legal title to the property so assigned, but only with the right of action which a judgment creditor would have to attack the assignment; and the assignment will be set aside only so far as to enforce the payment of the judgment upon which he was appointed receiver, and the expenses of that proceeding and costs. *Bostwick v. Menck*, 40 N. Y. 383.

An assignee in bankruptcy may maintain an action to set aside a conveyance as fraudulent without the necessity of a previous judgment and execution against the debtor who made it, as is required in the case of an individual creditor; and although none of the creditors have obtained a specific lien or have a standing in court to attack the conveyance. *Southard v. Bender*, Ct. of App. Al. Law J. N. Y. vol. 17, 511.

§ 244. *Parties*.—The action may be brought by the plaintiff in behalf of himself and all others similarly situated. *Brownson v. Gifford*, 8 How. Pr. 389, 395; *Habicht v. Pemberton*, 4 Sandf. 657; *Hammond v. Hudson Riv. I. and M. Co.*, 20 Barb. 378.

But the action may be, and more often is, brought by the creditor simply in his own behalf.

It is only necessary to make the assignor and the assignee parties. It is not necessary to make other creditors of the assignor parties (*Wheeler v. Wheedon* 9 How. Pr. 293; *Russell v.*

Lasher, 4 Barb. 232; *Rogers v. Rogers*, 3 Paige, 379; *Bank of British North America v. Suydam*, 6 How. Pr. 379) for the reason that the assignee represents all the creditors interested in the trust. His defense is their defense in the same manner as an executor represents the estate intrusted to him. *Wheeler v. Wheedon*, *supra*; *Bank of British North Am. v. Suydam*, *supra*. It is otherwise where the complainant is endeavoring to enforce a claim adverse to the interests of the other *cestui que trust*, but which was founded upon the supposed validity of the trust deed. *Rogers v. Rogers*, 3 Paige, 379.

The assignors are necessary parties (*Lawrence v. Bank of Republic*, 35 N. Y. 320), but the objection that there is a defect of parties, for the reason that they are not joined as parties defendant, is waived if not taken by demurrer or answer. *Hurlburt v. Dean*, 2 Abb. Dec. 428; s. c. 2 Keyes, 97.

Where the assignor is dead, the creditor cannot maintain an action against the assignee and the representatives of the deceased, without showing that the administrator or executor is colluding with the fraudulent assignee, or that he has refused to bring the action. *Bate v. Graham*, 11 N. Y. 237.

§ 245. *The complaint.*—The material allegations of the complaint in an action by a creditor to set aside an assignment as fraudulent, are (1) the recovery of judgment, (2) the return of execution, (3) the conveyance or assignment complained of, and (4) the fact that the assignment was made with the intent to hinder, delay and defraud creditors. It is not necessary to allege and set forth in the complaint the specific acts of fraud or facts showing a fraudulent intent upon which the plaintiff relies to establish the fraudulent intent. *Wilson v. Forsyth*, 24 Barb. 105; *Hastings v. Thurston*, 18 How. Pr. 530; s. c. 10 Abb. Pr. 418; see *Mott v. Dunn*, 10 How. Pr. 225; *Jessup v. Hulse*, 39 Barb. 539.

In the case last cited, plaintiff set forth the whole assignment with the schedules, and then alleged that the assignment was fraudulent and void upon its face, and was made with the intent to hinder, delay and defraud creditors. On a motion to

make the complaint more definite and certain, it was held to be good. But where the fraud complained of is extrinsic to the assignment, the better course is to plead the specific grounds of fraud. 1 Abb. Pr. 575.

§ 246. *Injunction and receiver.*—The court has power in such an action to restrain the transfer of the assigned property by the assignee, and to appoint a receiver. *Bloodgood v. Clark*, 4 Paige, 575; *Lent v. McQueen*, 15 How. Pr. 313; *Haggerty v. Pittman*, 1 Paige, 298; *Connah v. Sedgwick*, 1 Barb. 210; *Manning v. Stern*, 1 Abb. N. C. 409. But it is not a matter of course to enjoin the assignee from proceeding at all, and to appoint a receiver. The assignee may be permitted to convert the property into money, while he is enjoined from making any distribution of it until after the determination of the action. *Bishop v. Halsey*, 3 Abb. Pr. 400.

Where an action is brought to set aside an assignment for fraud, it is a strong reason against appointing a person receiver of the property assigned, that he was a party to the assignment. *Smith v. N. Y. Consolidated Stage Co.* 18 Abb. Pr. 419.

§ 247. *The relief granted.*—Assignments, fraudulent as to creditors under the statute, are not void *ab initio*, but voidable only at the instance of creditors who file bills to impeach and set them aside, and when an assignment is found to be thus fraudulent, the decree generally goes no further than to adjudge it fraudulent as to the creditor who has filed the bill, and set it aside so far as to give an opportunity of obtaining his debt and costs out of the property which was covered by it. *Davis v. Perrine*, 4 Edw. Ch. 66; *Henriques v. Hone*, 2 Id. 120; s. c. 13 Wend. 240; *Wakeman v. Grover*, 4 Paige, 42, 43; *Hitchcock v. St. John*, Hoff. Ch. 511; *Scouton v. Bender*, 3 How. Pr. 185. When actions are instituted by different creditors, they will be entitled to satisfaction out of the proceeds of real estate, in the order of the priority of their judgments, and out of the personalty, in the order in which their bills were filed and the equitable liens created. *Scouton v. Bender*, 3 How. Pr. 185.

When the property has been converted into money, the decree may simply direct that the assignee pay the plaintiff's claim and costs out of the assigned property or its proceeds in his hands. *Lester v. Pollock*, 3 Robt. 691, 693. But when it may be necessary to effectuate the purpose that the property be disposed of or otherwise made available for the satisfaction of the judgment, a receiver will be appointed by the court, and he may be directed to sell and apply the proceeds to the payment of the plaintiff's debt. *Edmeston v. Lyde*, 1 Paige, 637. And the assignee will be directed to account for the assigned property before a referee. *Produce Bank v. Morton*, 67 N. Y. 199. A decree appointing a receiver and directing an accounting is a final judgment reviewable by appeal. *Ibid.*

Where the action is framed for the purpose of setting aside the assignment, if the assignment is sustained, the assignee will not be compelled to account in that action. The creditor is not entitled to such a decree. *Cunningham v. Freeborn*, 11 Wend. 241; *Nicholson v. Leavitt*, 4 Sandf. 252, 311.

Where it appears that the assignment, although properly executed, has not been delivered, nor that the assignees have ever accepted the trust, and that the possession of the property has never been changed, but is still in the possession of the judgment debtor, the judgment creditor may nevertheless maintain an action to have the assignment set aside. If it were not so, the judgment creditor could have no method of getting the assignment out of the way in the collection of their judgment, unless they were willing to levy on the property, and take their chances of impeaching the judgment in a suit at law. *Gasper v. Bennett*, 12 How. Pr. 307.

§ 248. *Protection of assignee.*—Where a general assignment is set aside as fraudulent as against creditors, whatever moneys of the estate have been paid for expenses or to creditors, under the assignment, in good faith before the commencement of the action, will be allowed to the assignee. *Averill v. Loucks*, 6 Barb. 470; *Coope v. Bowles*, 42 Barb. 87; s. c. 18 Abb. Pr. 442; 28 How. Pr. 10; *Bostwick v. Berger*, 10 Abb. Pr. 197; *Colburn v. Morton*, 1 Abb. Dec. 378; *Young v.*

Brush, 28 N. Y. 667; *Scouton v. Bender*, 3 How. Pr. 185; *Wakeman v. Grover*, 4 Paige, 23. But he will not be allowed compensation for his own services. *Leavitt v. Yates*, 4 Edw. Ch. 134; *Coope v. Bowles*, 42 Barb. 87. The right of assignees in that respect fails them with the failure of their legal title, and the Court of Chancery cannot undertake to allow a compensation for services voluntarily undertaken and performed, in relation to property over which the parties could not lawfully assume and exercise a control for the purposes they intended. McCoun, V. C., *Leavitt v. Yates*, *supra*.

If an assignment, in trust for creditors, convey to the assignee land, under circumstances which renders it fraudulent, the assignee is not bound to account for the rents received and applied according to the terms of the trust before the commencement of the suit which resulted in declaring the instrument void, or before the attaching of any specific lien on the lands. *Columb v. Read*, 24 N. Y. 505.

§ 249. *Title of purchaser from assignee.*—Though a general assignment be fraudulent as against creditors, this does not affect the title of a purchaser from the assignees, if he be not connected with the fraud, and in fact, be a purchaser in good faith and for a valuable consideration, and without notice of the fraud. *Sheldon v. Stryker*, 42 Barb. 284; s. c. 27 How. Pr. 387.

Such a transfer is valid and effectual under the authority of the original proprietor, who has still the right to sell the property. *Pine v. Rikert*, 21 Barb. 469.

But if the assigned property were such that it might be seized and sold on an execution, it seems it might still be levied on in the hands of a purchaser from the assignees, provided he had either actual or constructive notice of the fraud at the time of the assignment. *Ames v. Blunt*, 5 Paige, 13.

§ 250. *Costs.*—Where an assignment is of such a suspicious character as would naturally induce a creditor to call for explanation, and an action is brought to set aside the assignment, the plaintiff will not be subjected to costs, if the relief asked

for be not granted. *Cunningham v. Freeborn*, 11 Wend 241.

The court may order the costs of all parties to be paid out of the funds in the hands of the assignees. *Grover v. Wakeman*, 11 Wend. 226.

It is not usual to charge the assignee with costs, even when the assignment is fraudulent on its face, except in cases of gross abuse of his trust. *Webb v. Daggett*, 2 Barb. 9.

Where the assignee, in a conveyance which is impeached on the ground of fraud, instead of disclaiming, puts in an answer which requires the complainant to reply and go into proofs, and it turns out that the conveyance is fraudulent, and such assignee had direct or constructive notice of the fraud, he will be subjected to the costs of the suit. *Mead v. Phillips*, 1 Sandf. Ch. 83; see *Leavitt v. Yates*, 4 Edw. Ch. 134.

CHAPTER XVII.

AMENDMENT, REFORMATION AND REVOCATION OF ASSIGNMENTS.

§ 251. *Alteration by assignor.*—The general principle in reference to all contracts is, that having been once made they are not subject to alteration or revocation, except by the consent of all parties or by a decree of a competent court of equity on the ground of mistake. This principle is applicable to general assignments. After the execution and delivery of the instrument, the assignor has no power to alter, amend or vary its terms or provisions. *Sheldon v. Smith*, 28 Barb. 593; *Porter v. Williams*, 9 N. Y. 142; *Metcalf v. Van Brunt*, 37 Barb. 621; *Messonnier v. Kauman*, 3 Johns. Ch. 3; *Bell v. Holford*, 1 Duer, 58.

But this principle applies only to instruments which have become perfected and completed instruments, although voidable at the election of creditors, and not to such as are wholly void. Thus an assignment which has not been properly acknowledged is wholly invalid under the statute (see *ante*, § 163). A subsequent acknowledgment, therefore, does not vary the instrument, but simply gives it a legal inception. So where an assignment was held void because the inventory and schedules were not filed within the time limited in the statute (the rule is now otherwise), it was held, that inasmuch as the assignment was insufficient to convey any title to the assignee, a subsequent conveyance by the assignor was good. *Juliand v. Rathbone*, 39 N. Y. 369.

Where the assignment is sufficient to convey a title to the assignee, although voidable as to creditors, the rule is different.

Thus, in the case of *Sheldon v. Smith* (*supra*), it was held that the effect of an assignment could not be varied by the execution of a note after the assignment, dating it back to a day prior to the assignment, for the purpose of having the note embraced in the schedule of debts preferred in the assignment. Nor can a defect in an assignment be cured, after creditors have

acquired a lien, by the subsequent execution of an instrument designed to remedy the evil. Thus where an assignment was fraudulent and void because containing a direction to the assignee to sell on credit, and after the institution of supplemental proceedings by creditors, the assignors executed another instrument, reciting the previous assignment and directing the assignees to sell for cash only, it was held that the assignors had no power to revoke or alter the previous assignment, at all events not to the prejudice of a creditor whose lien on the property had attached by the institution of supplementary proceedings. *Porter v. Williams*, 9 N. Y. 142. The doctrine of this case has been approved, although the point was said to be not necessarily involved in the case. See *Gates v. Andrews*, 37 N. Y. 657.

In *Hone v. Woolsey* (2 Edw. Ch. 289), where the original assignment was constructively fraudulent on its face, the assignees, before any lien of creditors had accrued, released and reconveyed to the assignors all the property embraced in the assignment, and a new assignment was executed by the assignors, free from the objectionable conditions contained in the former. The vice chancellor was of opinion, that since the first assignment was voidable and not void, it was capable of confirmation, and that the re-assignment and second conveyance transferred the property to the assignees divested of the objectionable features in the first assignment. The decision is rested upon the ground that creditors had not accepted the first deed, nor had their rights attached under it. This case was followed and approved by the chancellor in *Mills v. Argall* (6 Paige, 577).

Upon strict principles of law it is difficult to see how these decisions can be sustained. The first conveyance in each case was sufficient to convey a title good as against the assignor, upon the conditions contained in the assignment. The assignee, having accepted the trust, had but one duty to perform, and that to carry out the provisions of the instrument. A reconveyance by him to the assignor was in direct subversion of the duties he had assumed, and in violation of the trust; and that it was made with the ulterior object and expectation of receiving back a better conveyance from the assignor, did not make it any

the less a violation of duty. Such a conveyance, in contravention of the trust, is, under the statute (2 R. S. 730, § 65), absolutely void. And see *Briggs v. Davis*, 21 N. Y. 574; *Moran v. Hays*, 1 Johns. Ch. 339.

§ 252. *Revocation of the assignment.*—Nor can the assignment be revoked by the act of the assignor without the concurrence of all the parties to the instrument. In England, where a different rule prevails in reference to the implied assent of creditors to a deed of assignment, it has been held that such instruments were revokable by the grantor, until there had been actual acceptance by creditors, or acts tantamount to an acceptance. *Gerard v. Landesdale*, 3 Sim. 1; *Page v. Broom*, 4 Russ. 6; *Acton v. Woodgate*, 2 M. & K. 492; *Griffith v. Ricketts*, 7 Hare, 229; *Smith v. Hurst*, 10 Hare, 30; s. c. 15 Eng. L. & Eq. 520; *Law v. Bogwell*, 4 Dr. & War. 398; *Brown v. Cavendish*, 1 J. & L. 606; *Gibbs v. Glamis*, 11 Sim. 584; *Ravenshaw v. Collier*, 7 Sim. 3; *Simmonds v. Palles*, 2 J. & L. 489; *Walwyn v. Coutts*, 3 Sim. 14.

But in this country, as we have seen (*ante*, § 139), the rule is otherwise.

The assignment will not lose its legal validity simply because the parties have chosen to regard it as null and void. *In re Becker*, 2 Abb. N. C. 379.

The mere cancellation of the original assignment, by erasing the names of the assignors, will not operate to re-invest the assignors with the title to the property. *Metcalf v. Van Brunt*, 37 Barb. 621. Such is the general rule in reference to conveyances. *Parshall v. Shirts*, 54 Barb. 99; citing *Nicholson v. Halsey*, 1 Johns. Ch. 417; *Jackson v. Anderson*, 4 Wend. 474; *Kellogg v. Rand*, 11 Paige, 59; *Raynor v. Wilson*, 6 Hill, 469.

This principle is illustrated by the opinion of Chan. Kent in *Messonier v. Kauman* (3 Johns. Ch. 3). In that case an assignment was made for the benefit of K. & M., giving M.'s debts a preference. Subsequently the assignor and K., without the knowledge or consent of M., canceled the deed, and the assignor executed another assignment, putting M., K. and certain other creditors on an equality, and the fund eventually proved insuffi-

cient to pay all the debts specified in the second assignment, it was decided that the canceling of the first deed was void as to M., and that the second assignment, so far as it was inconsistent with the first as to rights of M., was void.

§ 253. *Reformation of assignment by action.*—An assignment, like any other instrument, may be corrected by a court of equity upon proof of mistake. And where the amount due to a creditor was inserted in the assignment at an erroneous amount by mistake, and an action was brought by the creditor against the assignee and all other creditors who chose to come in and avail themselves of the action to reform and correct the assignment in that particular, and demanding that the assignee be required to account, it was held that the complaint was not demurrable for a defect of parties plaintiff, because all the creditors were not joined as plaintiff, and that the demands for relief, to amend the assignment, and for an accounting, were properly united. *Garner v. Wright*, 28 How. Pr. 92; *affi'g* 24 Id. 144.

CHAPTER XVIII.

FOREIGN AND DOMESTIC ASSIGNMENTS.

§ 254. *In general*.—An assignment executed within this State may include lands or chattels, real or personals, situated in another State, and in like manner, assignments executed elsewhere may embrace various classes of property within this State. The question at once arises, by what law these transfers are to be governed. The assignment may be made in one State, the property assigned may be situated in another, the litigation may arise in one or the other of these States or in a third State, and the parties may have their domicile in still a different State. The inquiry therefore is whether the law of the place where the assignment is made, or of that where the property is situated, or of that where the litigation arise, or of that where the one or the other of the parties has his domicile, is to control. These systems of law are denominated the *lex loci contractus*, the *lex rei sitæ*, the *lex fori*, and the *lex domicilii*. Much learning and great research have been applied to the elucidation and determination of the law governing the general principles of jurisprudence upon which the questions thus presented depend. The purpose of this chapter is to present an outline of the judicial decisions in this country, which control the courts in determining the questions presented to them for adjudication upon questions of foreign and domestic assignments. In the first place, it is to be observed that the laws of a State can have, of their own vigor, no extra territorial effect. So far as the laws of any State are regarded, outside of the jurisdiction of that State, it is simply by force international or inter-State comity. This comity is not extended to all kinds of transfers, nor to transfers of all species of property. For the present purpose it is necessary at the outset to observe the distinction between bankrupt assignments which are the result of statutory

proceedings, and voluntary assignments which rest on the consent of parties.

§ 255. *Bankrupt assignments.*—With regard to transfers under foreign bankrupt and insolvent law, there is in the country, little if any conflict of authority. It appears to be settled law that a conveyance by operation of proceedings under foreign bankrupt and insolvent laws, cannot affect property outside of the State or country in which the law is enacted. Story on Conf. of Laws, §§ 410, 411. This principle has been most frequently applied in contests between assignees claiming under a foreign bankrupt assignment and resident creditors claiming under attachment proceedings, and in such cases it has been held in this State, and in most if not all of the United States, that the title acquired under the foreign bankrupt or insolvent proceedings, will not prevail against the rights of attaching creditors where the property is situated. *Harrison v. Sterry*, 5 Cranch, 289; *Ogden v. Saunders*, 12 Wheat. 213; *Plestorio v. Abraham*, 1 Paige, 236; *Holmes v. Remsen*, 20 Johns. 229; *Hoyt v. Thompson*, 5 N. Y. 320; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207, 226; *Kelly v. Crapo*, 45 N. Y. 86; rev'd 16 Wall. 610; *Osborn v. Adams*, 18 Pick. 245, 246; *Felch v. Bugbee*, 48 Me. 9; 2 Kent's Com. 405, 408.

"This result," says Dr. Wharton, in his work on Conflict of Laws (§ 392), "is sometimes based on the position that compulsory conveyances in bankruptcy are the creatures of local law, and should not be extra territorially extended, and sometimes on the priority which every State in case of collision should give to its own subjects."

Whatever be the true ground of the rule, it is now to be regarded as definitely settled. Elaborate discussions of the subject will be found in the cases above cited, and especially in the leading cases of *Remsen v. Holmes*, 20 Johns. 229; *Blake v. Williams*, 6 Pick. 286; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Milne v. Moreton*, 6 Binn. (Pa.) 353; and in Story on Conf. of Laws, § 410, *et seq.* So far has the rule been extended as to permit even a resident of a foreign State to obtain an attachment which will be good as against a subsequent bankrupt as-

signment in his own State. *Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 585; see *Johnson v. Hunt*, 23 Wend. 87.

The fact that the conveyance made in the course of such foreign bankrupt or insolvent proceedings, is executed by the debtor himself, and not by an officer of the court, is not significant, if in point of fact it is merely ancillary to the legal proceedings. *Hutchinson v. Peshine*, 16 N. J. Eq. 169; *Holmes v. Remsen*, 20 Johns. 229, 254.

§ 256. *Right of foreign bankrupt assignee to sue.*—It was formerly held in this State that under general principles of comity, assignees of a foreign bankrupt were entitled to sue for and recover debts due to the bankrupt within this State, except when the claim of the assignees came into conflict with creditors in this State claiming under attachments against the bankrupt's property. *Bird v. Pierpont*, 1 Johns. 118; *Bird v. Caritat*, 2 Id. 342; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Holmes v. Remsen*, 20 Johns. 229, 267. The assignee sued as the representative of the bankrupt. But since the case of *Abraham v. Plestoro* (3 Wend. 538), this doctrine has been doubted if not denied. *Raymond v. Johnson*, 11 Johns. 488; *Moselman v. Caen*, 34 Barb. 66; *Hoyt v. Thompson*, 5 N. Y. 320, 351; *Willeys v. Waite*, 25 N. Y. 577; s. c. 13 How. Pr. 34. Though Shipman, J., in *Hunt v. Jackson* (5 Blatchf. 394), expressed the opinion that these decisions do not go to the extent of prohibiting assignees, under foreign bankrupt laws, from suing in the courts of this State. See *Hooper v. Tuckerman*, 3 Sandf. 311.

§ 257. *Voluntary assignments.*—Voluntary assignments stand upon entirely different principles from involuntary bankrupt or insolvent assignments. *Hoyt v. Thompson*, 5 N. Y. 320, 352. The latter are compulsory and operate *in invitum*; the former are the voluntary act of the assignor, and have such force and effect as is given in law to all contracts. Story on Conf. of Laws, § 411. "It is therefore admitted," says Justice Story, in the section last cited, "that a voluntary assignment by a party according to the law of his domicile, will pass his personal estate, whatever may be its locality abroad as well as at home."

But this statement is greatly qualified by the learned writer

cited, and, as we shall see, is sustained by the authorities only to a limited extent. A distinction is to be taken at the outset as to conveyances of real as distinguished from conveyances of personal property.

§ 258. *Real estate*.—It is said by Mr. Justice Duer, in *Nicholson v. Leavitt* (4 Sandf. 252, 276), that: “If it is possible to state any legal proposition or maxim that has never been the subject of dispute or doubt, but which is proclaimed and established by the unbroken and unvarying harmony of the decisions in England and the United States, it is that the validity of every disposition of lands, whether the disposition be absolute or qualified, whether it passes an estate or merely imposes a charge, depends exclusively upon the municipal law of the country or State in which the lands are situate.” Story Conf. of Laws, § 428. “It is of no consequence where the instrument containing the disposition is made or delivered, nor where the parties reside, since, in all cases, it is neither the *lex loci contractus* nor the *lex domicilii*, but solely the *lex loci rei sitæ* that governs the construction, and so universal is the rule, that neither in the law of England nor in our own (although it seems to be otherwise in some foreign countries) has a solitary exception ever been admitted.”

In support of a rule which can be stated thus absolutely and without qualification, it will be necessary to refer only to a few of the principal authorities. *Bonati v. Welsch*, 24 N. Y. 157; *Slatter v. Carroll*, 2 Sandf. Ch. 573; *Hutchinson v. Peshine*, 1 Green (N. J.), 167; *McGoon v. Scales*, 9 Wall. 23; *Osborne v. Adams*, 18 Pick. 247; *Loring v. Pairo*, 10 Iowa, 282; *Lucas v. Tucker*, 17 Ind. 41; *Rogers v. Allen*, 3 Ohio, 488; *Nelson v. Bridport*, 8 Bosw. 547; *Brodie v. Berry*, 2 Ves. & B. 131; *Curtis v. Hutton*, 14 Ves. 537; *Birthwhistle v. Vardill*, 2 Barn. & C. 438; s. c. 9 Bligh, 32; *Harrison v. Harrison*, 42 L. J. Chan. 495.

But while this rule is admitted in its full force, it does not follow that because an assignment executed in this State covers real property situated in another State, that therefore it cannot be assailed here on the ground that the instrument was in fraud of citizens here, or that it was obtained fraudulently from the

grantor. *D'Ivernois v. Leavitt*, 23 Barb. 63, 80; see *Nicholson v. Leavitt*, 4 Sandf. 252, 276, 277.

An apparent if not a real exception to the rule so broadly stated by Justice Duer, is to be found in the case of *Thurston v. Rosenthal* (42 Mo. 474). In that case the assignment was executed in New York, covering real estate situated in Missouri. The assignment was good in New York but bad under the Missouri law, although executed and acknowledged in compliance with that law. It was held in Missouri that the assignment was good as against an execution creditor who was a resident of the State of New York.

§ 259. *The remedy is governed by the forum.*—Another proposition which is well established, and which helps to clear the general subject of some perplexity, is that with regard to the remedies, the methods of procedure, all the machinery of the law, the place of trial governs. *Lodge v. Phelps*, 1 Johns. Cas. 139; *Ruggles v. Keeler*, 3 Johns. 263; *Scoville v. Canfield*, 14 Johns. 338; *Andrews v. Herriot*, 4 Cow. 508 and note; *Speed v. May*, 17 Penn. St. 95; *Jones v. Taylor*, 30 Vt. 48; *Harrison v. Story*, 5 Cranch, 289; *Smith v. Atwood*, 3 McLean, 545.

§ 260. *Voluntary assignments of personal property in general.*—It is with reference to corporeal personal property that the greatest conflict of opinion exists as to whether it is to be governed by the law of the place where it is situated, or by the law of the place of the contract of transfer. Speaking of personal property, Mr. Justice Story says (Story on Conf. of Laws, § 383): “that the laws of the owner’s domicile should in all cases determine the validity of every transfer, alienation or disposition made by the owner, whether it be *inter vivos* or *post mortem*. And this is regularly true, unless there is some positive or customary law of the county where they are situate, providing for special cases (as is sometimes done), or from the nature of the particular property it has a necessarily implied locality.”

Dr. Wharton, in his work on Conflict of Laws, while admitting that until recently the view expressed by Justice Story

was the prevailing one, insists that the rule has of late undergone a change, and he undertakes to formulate the true proposition in reference to what is commonly known as personal property, as follows: "Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit or following the owner's person, are governed by the *lex situs*, except so far as the parties interested may select some other law."

It may safely be asserted, however, that the decisions of the courts in this country have been quite uniformly based upon the rule, as stated by Judge Story, and the conflict of authority, in so far as it exists, arises from a want of uniformity in the application of the exception stated.

Now, as to foreign voluntary assignments which do not conflict with the law of the place where the personal property is situated, it is in most States freely admitted that such conveyances operate to transfer the title to the assignee as against process in favor of resident creditors. *Kelsadt v. Reily*, Daily Reg. Aug. 9, 1878; Van Brunt, J., *Moore v. Willett*, 35 Barb. 663; *Caskie v. Brown*, 2 Wall. 131; *Speed v. May*, 5 Harris (Pa.), 91; *Law v. Mills*, 18 Penn. St. 185; *Bholen v. Cleveland*, 5 Mason, 174; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Parsons v. Lyman*, 20 N. Y. 103; *Green v. Mowry*, 2 Bailey (S. C.), 163; *Smith v. Chicago & N. W. R. R. Co.* 23 Wis. 267; *Forbes v. Scannell*, 13 Cal. 241.

There are Massachusetts and New Hampshire decisions the other way, which seem to place foreign voluntary assignments upon the same basis with foreign bankrupt assignments. *Ingraham v. Geyer*, 13 Mass. 146; *Fox v. Adams*, 5 Greenl. (N. H.), 245; see also *Borden v. Sumner*, 4 Pick. 265; *Blake v. Williams*, 6 Id. 286; *Fall River Iron Works v. Croade*, 15 Id. 11; 2 Kent's Com. 407.

Generally courts which have refused to give effect to foreign assignments, valid where made, have placed their decisions upon the ground that such assignments were repugnant to some statutory or customary law of the State where they were sought to be enforced. It becomes important, therefore, to consider what is meant by the exception which prescribes that the principle of comity yields when the laws and policy of the State where the

property is located has prescribed a different rule of transfer with that of the State where the owner lives.

§ 261. *Assignments which contravene the law of the situs.*—The exception to the law of transfer of personal property, if it be an exception, to wit, that a transfer, valid where made, will not operate upon personal property situated in a foreign State where the transfer is repugnant to the laws of that State, is the more difficult of clear apprehension, because it has been expressed in such various forms of language. Thus Chancellor Kent (2 Kent's Com. 455) says: "The necessary intercourse of mankind requires that the acts of parties, valid where made, shall be recognized in other countries, *provided they be not contrary to good morals nor repugnant to the policy and positive institutions of the State.*"

Judge Redfield, in *Hanford v. Paine* (32 Vt. 442, 456), says: "In regard to general voluntary assignments for the benefit of creditors, it seems to be an admitted rule, that if valid, according to the laws of the place of the domicile of the assignor, they will have the effect to pass all the personal property of the assignor wherever situated, unless their operation is limited or restrained by some local law or policy of the State where the same is situated."

Speaking to the same rule of law, but in the case of a different class of transfers, Mr. Justice Walker says, in *Mumford v. Cauty* (50 Ill. 370, 375): "This rule" (the enforcement of foreign contracts) "is, however, never adopted when it would contravene our criminal laws, or would sanction vice or immorality, *or is against a positive prohibition of law.*"

And in *Guillander v. Howell* (35 N. Y. 657), Mr. Justice Peckham says: "What is injurious to the rights of citizens where the property is situated should be the subject of positive legislation, and not left to the discretion of the courts;" citing Story on Conf. of Laws, § 390.

It will be seen from these citations that the instances in which a judicial tribunal may refuse to regard a transfer of personal property made elsewhere as being repugnant to the laws or policy of the place where the property is situated, are not clearly defined. Reference to the facts of report cases

bearing on the subject will enable us to draw some limits to the rule, and will go far to establish the doctrine as laid down in citation given above from the opinion of Peckham, J., in *Guillander v. Howell*.

An important class of cases is that in which assignments giving preferences are relied upon to sustain transfer of personal property in States where such assignments are prohibited. The preponderance of authority supports the proposition that when such assignments are declared by statute to be fraudulent or invalid at the place where the property is situated, they will not be sustained, although valid by the law of the State where made. Thus, in New Jersey, where assignments with preferences are prohibited by statute, an assignment executed under the laws of this State, where preferences are allowed, was held incompetent to pass title. *Varnum v. Camp*, 1 Green (N. J.), 329. So in Massachusetts. *Zipsey v. Thompson*, 1 Gray, 243; *Boyd v. Rockford Mills*, 7 Gray, 406. So in Missouri. *Bryan v. Brisbin*, 26 Mo. 423. But the preference will be disregarded and the conveyance sustained. *Kitchin v. Reinskey*, 42 Mo. 427. So in Delaware. *Maberry v. Shisler*, 1 Har. (Del.), 349. So in Georgia. *Stricker v. Tinkham*, 35 Geo. 177. So in Louisiana. *U. S. v. U. S. Bank*, 8 Rob. 262; *Southern Bank v. Wood*, 14 La. Ann. 554; see *Olivier v. Townes*, 14 Martin (La.), 93.

In the Ohio case of *Fuller v. Steiglitz* (27 Ohio St. 355), a New York assignment giving preferences, invalid under the laws of Ohio, was held to confer a sufficient title upon the assignee to sue to recover assets belonging to the estate in that State. The court recognized the exception to the general rule of comity, but held that it applied only when there was an actual conflict of rights growing out of a conflict of laws of the two States. If by attachment or otherwise the property had been seized, and a lien or charge created against it under the Ohio law, it was intimated that the decision might have been different.

In *Guillander v. Howell* (35 N. Y. 657; s. c. 6 Am. Law Reg. [N. S.] 522; see note, p. 527), where an assignment was made in New York, containing preferences, and the assignors had certain personal property in New Jersey covered by the

assignment, which property was attached by the defendants, who were creditors residing in New Jersey, and sold in satisfaction of their claims, in an action brought in this State against the defendants for the detention and conversion of the property, it having been shown that an assignment giving preferences was void in New Jersey by the laws of that State, it was held that the assignment was ineffectual to convey the personal property situated in New Jersey, although valid under the laws of this State.

The case of *Van Buskirk v. Warren* (34 Barb. 547; 13 Abb. Pr. 145; aff'd 2 Keyes, 119; 4 Abb. Dec. 457; rev'd on appeal to U. S. Sup. Ct. as *Green v. Van Buskirk*, 6 Wall. 307; 7 Wall. 139; s. c. 52 How. Pr. 52), which went through all the courts, is an important and instructive case. The facts were as follows: One Bates, who lived at Troy, New York, and owned certain iron safes in Chicago, Illinois, in order to secure an existing indebtedness to Van Buskirk and others, executed and delivered, in the State of New York, a chattel mortgage on the safes. Two days after this, Green, also a creditor of Bates, sued out of the proper court of Illinois a writ of attachment, caused it to be levied on the safes, got judgment in the attachment suit, and had the safes sold in satisfaction of his debt. At the time of the levy of the attachment the mortgage had not been recorded in Illinois, nor had the attaching creditor notice of its existence. The mortgagees subsequently sued Green in New York for taking and converting the safes. He defended the taking and conversion under the Illinois attachment proceedings, but judgment was nevertheless rendered against him in the lower court, which was affirmed on appeal to the Court of Appeals, but reversed in the Supreme Court of the United States. The decisions of the State courts were placed upon the ground that all the parties to the transaction being residents of the State of New York, the transfer was to be governed by the law of the owner's domicile, and that therefore Bates, at the time of the attachment had no property in the safes upon which the suit could operate, and no title could be acquired under it. It should be observed that under the Illinois statute, mortgages on personal property have no validity against the rights and interests of third persons with-

out being acknowledged and recorded, unless the property be delivered to and remain with the mortgagee.

The Supreme Court of the United States affirmed its jurisdiction (6 Wall. 307), to entertain an appeal under the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and considering the question upon its merits, decided that the law of the State of Illinois having been shown to be such that no title to the personal property passed under the mortgage as against creditors by reason of the want of delivery of the property, and that the lien of the attachment proceedings was therefore valid, the full faith and credit required by the constitution to be given to the judicial proceedings of other States required the New York courts to respect the title of the attachment creditor in Illinois. Speaking of the ground on which the decision in the State court was placed, Mr. Justice Davis makes use of the following observations: "The theory of the case is that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns, wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined.'" He adds, "we do not propose to discuss the question how far the transfer of personal property, lawful in the owner's domicile, will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question on which learned courts have differed; but after all, there is no absolute right to have such transfer respected, and it is only on principles of comity that it is ever allowed; and this principle of comity always yields when the laws and policy of the State where the property is located have prescribed a different rule of transfer from that of the State where the owner lives."

In all the cases thus far cited in this section, it will be observed that the invalidity of the transfer at the place where the property was situated arose from positive legislation. Statutes,

however, which regulate the mode of executing and administering assignments, such as the assignment act of this State, are intended to affect only assignments executed within the State, or such as are made by residents of the State. *Ockerman v. Cross*, 54 N. Y. 29; *Hanford v. Paine*, 32 Vt. 442; *Wilson v. Caison*, 12 Md. 54. They have no application whatever to assignments executed without the State by non-residents.

In *Philson v. Barnes* (50 Penn. St. 230), it was held that an assignment executed by a non-resident, but not recorded as required by the Pennsylvania statute, was invalid as against an attaching creditor in Pennsylvania, but that case is exceptional, and turns upon the phraseology of the Pennsylvania statute.

Turning now from the cases in which a foreign assignment has been held invalid, because of some statutory prohibition relating to such instruments, to the cases in which the invalidity has been sought to be established by showing that the assignment, though valid where made, is invalid because fraudulent by reason of a construction placed upon the statute of frauds by the courts where the property is situated different from the construction adopted at the place where the assignment is made, we shall find that the cases are by no means so easy of reconciliation. The preponderance of authority, as well as the weight of argument, seems to be in favor of sustaining such transfers.

Thus, in the Supreme Court of the United States, in a case elaborately argued, where the assignment was made in Rhode Island by persons residing there, conveying property, a portion of which was situated in New York, and the deed of assignment contained reservations which, although valid in Rhode Island, would have rendered the conveyance void if made in New York, in a creditor's action brought in the Circuit Court of the United States in New York, it was held that the assignment, being valid in Rhode Island, was sufficient to sustain the title in the assignees in New York. *Livermore v. Jenckes*, 21 How. (U. S.) 126.

So in *Baltimore & Ohio R. R. v. Glenn* (28 Md. 287), where an assignment was made in Virginia by a corporation of that State, containing provisions which, under the statute of frauds, as expounded in the State of Maryland, would have rendered it void, but which were valid under the laws of the State of Virginia, the assignment was sustained in Maryland. The court

recognized and acted upon the principle that if the deed was a legal instrument in Virginia, where it was made, it was so everywhere, "unless it violates good morals or is repugnant to some law or policy of the State."

And to the same general effect are *Frazier v. Fredericks*, 24 N. J. L. (4 Zab.), 162; *Mowry v. Crocker*, 6 Wis. 326; *Law v. Mills*, 18 Penn. St. 185; *Caskie v. Webster*, 2 Wall. Jr. 131; *Fuller v. Steiglitz*, 27 Ohio St. 355.

In *Moore v. Willett* (35 Barb. 663), where the assignment was made in North Carolina and contained a clause allowing the assignees to sell on credit, and also to continue the business at their election, provisions which, as we have seen, would render the assignment, if executed here, fraudulent and void, in an action brought here by the assignees to recover the possession of a portion of the assigned property levied upon by the sheriff under an execution on a judgment obtained by a creditor in this State, it was held that the provisions in the assignment, good where it was executed, but rendering it void in this State, did not impair its validity here, and the title of the assignee was sustained.

But in *Rice v. Courtis* (32 Vt. 460), where the assignment was made in New York and was valid under the laws of that State, but a portion of the property covered by it was in Vermont, and there was no change of possession of the property such as is required by the local law of Vermont, as declared by its courts, it was held that the assignment was invalid as against a subsequent attachment in Vermont.

In *Ingraham v. Geyer* (13 Mass. 145), the assignment was made in Pennsylvania, and was invalid under the common law of Massachusetts. The Massachusetts court refused to sustain it against a resident attaching creditor. This case was followed in *Fall River Iron Works v. Croade*, 15 Pick. 11; *Fox v. Adams*, 5 Greenl. 245; see *Rhode Island Cent. Bank v. Danforth*, 14 Gray (Mass.), 123. In that State an assignment not assented to by creditors is void at common law. *Edwards v. Mitchell*, 1 Gray, 239; *Russell v. Woodward*, 10 Pick. 408.

§ 262. *Choses in action*.—With regard to debts and choses in action generally, since they can have no locality, they are said to follow the person, and pass by a general assignment executed

by him, even though the persons owing the debts are foreign to the domicile of the assignor. *Guillander v. Howell*, 35 N. Y. 657; s. c. 6 Am. L. Reg. 522; and see the able note to this case at page 527; *Caskie v. Webster*, 2 Wall. Jr. 131; *Speed v. May*, 17 Penn. St. 91; *Noble v. Smith*, 6 R. I. 446; *Clark v. Conn. Peat Co.* 35 Conn. 303; *Smith v. Chicago & N. W. R. R. Co.* 23 Wis. 267; Wharton on Conf. of Laws, § 545, *et seq.* And the title will pass to the assignee without notice to the assignor's debtor, except only so far as the debtor may have dealt in good faith with the assignor. *Beckwith v. Union Bank*, 9 N. Y. 211; *Noble v. Smith*, 6 R. I. 446; *Warren v. Copelin*, 4 Mete. 394; see *Anderson v. Van Allen*, 12 Johns. 343; *Wilkins v. Batterman*, 4 Barb. 47. If, by the laches of the assignee in leaving the debtor in ignorance of his claim, the debtor deals with the original creditor as if he were still his creditor, and thereby becomes prejudiced, it is the loss of the assignee and not of the debtor. *Noble v. Smith*, *supra*; *Holmes v. Remsen*, 4 Johns. Ch. 460; see *Emerson v. Partridge*, 27 Vt. 8; *Ward v. Morrison*, 25 Id. 593; *Muir v. Schenck*, 3 Hill, 228; Story on Conf. of Laws, § 396; *Mowry v. Crocker*, 6 Wis. 326.

§ 263. *Ships at sea*.—Property at sea or in transit passes by any valid conveyance made by the owner. * Wharton Conf. of Laws, § 356; *Plestorio v. Abraham*, 1 Paige, 236. Hence an assignment of a ship on the high seas passes a title to the assignees, if the assignment is valid at the place where it is made. *Moore v. Willett*, 35 Barb. 663; *Southern Bank v. Wood*, 14 La. Ann. 554. And the same rule has been applied where the assignment was made under bankrupt proceedings. Thus, in *Crapo v. Kelly* (16 Wall. 610), an assignment of the debtor's property was made under the insolvent laws of Massachusetts. Among the assigned property was a ship, which was at sea at the time of the assignment. Subsequently the vessel arrived at the port of New York, where she was attached by a creditor residing in that State, and the action was brought to determine with whom was the prior right. The Court of Appeals (45 N. Y. 86) held that the title to the vessel did not pass to the assignee, but this opinion was overruled in the Supreme Court of the United States upon the ground that the

vessel being a Massachusetts vessel, was to be deemed a portion of the territory of that State, and that the assignment by the insolvent court of that State passed the title to her in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed.

§ 264. *Where the parties are all subjects of the State in which the assignment is made.*—Another general consideration governing the application of the rule giving effect to assignments as between different States, is the residence or domicile of the parties affected by their operation. The important qualification of the rule of comity which has just been noticed, is limited in its terms to citizens of the State where the provisions of the assignment are sought to be enforced. As against citizens of other States, and especially as against citizens of the State where the assignment was made, the rule appears to hold without qualification, that an assignment, valid by the laws of the State in which it is made, is valid everywhere. Burrill on Assgts. 3d.ed. 415. In other words, it has been held that where questions as to extra territorial property arise between foreign assignees and foreign creditors domiciled in the same State, the foreign laws to which such parties are subject will be upheld. *Bentley v. Whittemore*, 19 N. J. Eq. 462; rev'g s. c. 18 N. J. Eq. 366; *Abraham v. Plestoro*, 3 Wend. 540; s. c. 1 Paige, 236; *Sanderson v. Bradford*, 10 N. H. 260; *Hall v. Boardman*, 14 N. H. 38; *Thurston v. Rosenfield*, 42 Mo. 494; *Burlock v. Taylor*, 16 Pick. 335; *Moore v. Bonnell*, 2 Vroom. 90; *Whipple v. Thayer*, 16 Pick. 25; *Burlock v. Taylor*, Id. 335; *Martin v. Potter*, 11 Gray, 37.

It is not easy to say how far this doctrine was intended to be affected by the decision in *Green v. Van Buskirk* (7 Wall. 139), abstracted above. Dr Wharton (Wharton on Conf. of Laws, § 371) distinguishes that case upon the ground of the positive enactment of the State of Illinois in reference to the recording of chattel mortgages. He says: "If a State provide that no title shall pass to property within its borders except on certain conditions, such provision cannot be overridden by any foreign law which parties domiciled abroad may choose to interpolate."

PART IV.

THE ADMINISTRATION OF THE ASSIGNED ESTATE.

CHAPTER XIX.

JURISDICTION OF COUNTY COURT AND COMMON PLEAS UNDER THE GENERAL ASSIGNMENT ACT OF 1877.

§ 265. *In general.*—Having heretofore discussed the various methods by which assignments for creditors may be made, both under the provision of the Revised Statutes in reference to insolvent debtors, and also under the act of 1877 and the common law in reference to general voluntary assignments, we come now to a consideration of the rights and duties of the assignee and of creditors growing out of the execution of such instruments.

But before proceeding to the consideration of these matters in detail, it is proper to inquire into the extent and limit of the jurisdiction conferred upon the county court by the general assignment act of 1877.

§ 266. *Jurisdiction of county court.*—The sections of the act of 1877, to which it is necessary to refer in this connection, are as follows: “Any proceeding under this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and cred-

itors, and jurisdiction shall be presumed in support of the orders and decrees therein, unless the contrary be shown, and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein." Laws of 1877, chap. 466, § 25.

It is also provided by a previous section, that "All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced and appealed from, the same as if made in an original action brought in the county court. And all proceedings under this act shall be deemed to be had in court. The said court shall always be open for proceedings under this act. The county judge, when named in this act, shall, in such proceedings, be deemed to be acting as the court." Laws of 1877, chap. 466, § 22 ; amended Laws of 1878, chap. 318.

In addition to the general powers conferred under these sections, the act expressly authorizes the county court (the county judge when named in the act, in all proceedings under the act, is deemed to be acting as county judge) to authorize the assignee to advertise for creditors to present claims (§ 4), to remove the assignee (§ 6), and to require and allow amendments to the inventory and schedules (§ 6), to require further security to be given by the assignee (§ 7), to continue proceedings on the death of the assignee (§ 10), to compel an accounting and distribution of the assigned estate (§§ 11-21), and to order the examination of witnesses and the production of books and papers (§ 21), and to authorize the assignee to compromise and compound claims or debts belonging to the estate (§ 23). These various matters are made the subject of special examination in the succeeding chapters.

§ 267. *In case of disability of county judge.*—The Code of Civil Procedure has provided for a continuance of special proceedings in case of the disability of the county judge.

"If the county judge is for any cause incapable to act in an action or special proceeding pending in the county court or before him, he must make and file in the office of the clerk a certificate of the facts ; and thereupon the special county judge, if

any and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge or the special county judge is disqualified, the action or special proceeding is removed to the Supreme Court, if it is then pending in the county court. If it is pending before the county judge, it may be continued before any justice of the Supreme Court within the same judicial district. The Supreme Court, upon the application of either party, made upon notice and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court may, and if the special county judge is also incapable to act must, make an order removing it to the Supreme Court. Thereupon the subsequent proceedings in the Supreme Court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken which might have been taken in the county court." Code of Civ. Pro. § 342.

§ 268. *Jurisdiction of Court of Common Pleas.*—"In the city and county of New York all papers, except assignments, which by this act are required to be hereafter filed or recorded in the county clerk's office, shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county; and any judge of said court may exercise all the powers of a county judge for said county for the purposes of this act, and any act or proceeding commenced or returnable before, or instituted or ordered by, one of the judges of said court, may be heard, continued or completed, by or before any other of them." Laws of 1877, chap. 466, § 24; see Code of Civ. Pro. §§ 266, 267.

The judges of the Court of Common Pleas were included in the term county judge, employed in the act of 1860; and its amendments and the jurisdiction conferred by those acts upon the county judge, was rightfully exercised by the judges of the Court of Common Pleas, when the debtor resided in the city of New York. *In re Morgan*, 56 N. Y. 629.

§ 269. *Concurrent jurisdiction in equity.*—It will be observed that these powers conferred upon the county court and

Court of Common Pleas by this act, are those ordinarily exercised by courts of equity. And those courts still retain and may exercise their jurisdiction over the same matters. This act has not limited or abridged their powers. It has given a new and more expeditious remedy to creditors, but that remedy, upon familiar principles of construction, is cumulative and not exclusive. *Scidmore v. Smith*, 13 Johns. 322; *Colden v. Eldred*, 15 Id. 220; *Platt v. Sherry*, 7 Wend. 236; *Stafford v. Ingersol*, 3 Hill, 38; *Waterford, &c. v. People*, 9 Barb. 161.

So it has been held that the authority conferred upon the county court under this act, to entertain proceedings for an accounting is not exclusive. An action for an accounting in equity may still be brought in any court having equity jurisdiction. *Heissenbuttel v. Rogers*, Daily Reg. January 19, 1878, Davis, J.

On the other hand it is to be observed that, although the Court of Common Pleas has a general equity jurisdiction, and the county court may exercise equity powers in certain instances, yet the authority conferred under the general assignment act in special proceeding, is purely statutory and is not enlarged by the general equity power of the court. *Shipman's Petition*, 1 Abb. N. C. 406; *Matter of Lewis*, Daily Reg. Aug. 9, 1878.

§ 270. *Filing and recording papers under the act; Fees.*
—“The clerk of the court shall keep a separate book, in which shall be entered each case, the date and place of record of the assignment, and a minute of all proceedings therein, under this act, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court, settling, rejecting or adjusting claims, and directing the payment of money, or releasing assets by the assignee, and removing or discharging the assignee and his sureties, and such other orders as the court shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute book, and fifty cents to be paid by the assignee,

unless otherwise directed, for recording each order or decree required by this act or the general order of the court." Laws of 1877, chap. 466, § 22 ; as amended by Laws of 1878, chap. 318.

"In the city and county of New York all papers, except assignments, which, by this act, are required to be hereafter filed or recorded in the county clerk's office, shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county." Laws of 1877, chap. 466, § 24.

CHAPTER XX.

THE INVENTORY, SCHEDULES AND BOND.

§ 271. *In general.*—The first step to be taken under the general assignment act, after the execution of the assignment, is the preparation of the inventory and schedules, and the assignee's bond. These matters, which in part devolve upon the assignor and in part upon the assignee, are properly to be considered before entering at large upon the rights and duties of the assignee under the assignment.

§ 272. *The inventory and schedules.*—By the third section of the general assignment act of 1877, as amended, it is provided as follows :

“A debtor making an assignment shall, at the date thereof, or within twenty days thereafter, cause to be made and delivered to the county judge of the county where such assignment is recorded, an inventory or schedule containing,

“1. The name, occupation, place of residence, and place of business of such debtor.

“2. The name and place of residence of the assignee.

“3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

“4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same, according to the best knowledge of such debtor.

“5. An affidavit made by such debtor, that the same is in all respects just and true. But in case such debtor shall omit, neglect or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such

assignment shall, within thirty days after the date thereof, cause to be made, and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can; and for such purpose said county judge shall, at any time, upon the application of such assignee, compel by order such delinquent debtor, and any other person, to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true, to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule within said thirty days, the county judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days, or such further time as may be allowed, the county judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order, and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt, and obedience to such order may be enforced by attachment. The inventory or schedule shall be filed by said county judge in the office of the clerk of said county in which said assignment is recorded." Laws of 1877, chap. 466, § 2, 5th paragraph, as amended by Laws of 1878, chap. 318, § 1; see Laws of 1860, chap. 348, § 2; Laws of 1874, chap. 600, § 1.

§ 273. *Previous statutory provisions.*—The act of 1860 (Laws of 1860, chap. 348, § 2) provided that, at the date of the assignment or within twenty days thereafter, the debtor should make and deliver to the county judge of the county in which the debtor resided at the date of the assignment, an inventory

or schedule, precisely as required by an insolvent debtor under the two-third act (*ante*, § 24), with the additional requirement that he should state the value of the estate according to the best knowledge of such debtor.

In 1874 (Laws of 1874, chap. 600), the section was amended by providing that, in case the debtor omitted or refused to make and deliver the inventory specified, the assignment should not, for that reason, be invalid or ineffectual. It further provided that, in case of such refusal or neglect on the part of the assignor, the assignee might, within six months after the date of the assignment, make and file an inventory or schedule of all the property of the debtor which he might be able to find.

The act of 1860, with the amendment of 1874, was repealed by the act of 1877, and an inventory and schedule, as required by the section cited above, were provided. It will be observed that the inventory or schedule differs in form, though not materially in substance, from that required under the former act. The act of 1877, however, provided that in case the inventory should not be filed within thirty days by the debtor or the assignee, the assignment should be void. This provision was repealed by the amendatory act of 1878, and the removal of the assignee is now the only penalty for a failure to file the inventory and schedules.

§ 274. *Failure to file inventory and schedules.*—Under the provisions of the act of 1860, previous to the amendment of 1874, it was held that the making and delivery of the inventory and schedules within the time limited in the act was essential to the validity of the assignment. *Juliand v. Rathbone*, 39 N. Y. 369; rev'g s. c. 39 Barb. 97; *Hardmann v. Bowen*, 39 N. Y. 196; see *Fairchild v. Gwinne*, 16 Abb. Pr. 23; s. c. 14 Abb. Pr. 121; *contra*, *Van Vleet v. Slauson*, 45 Barb. 317; *Evans v. Chapin*, 12 Abb. Pr. 161; s. c. 20 How. Pr. 289; *Barbour v. Everson*, 16 Abb. Pr. 366; *Read v. Worthington*, 9 Bosw. 617.

The act of 1874 (Laws of 1874, ch. 600), provided that the omission to make or deliver the schedule should not invalidate the assignment. It was the intent of that act to abrogate the rule laid down in *Juliand v. Rathbone* (*supra*), and the provis-

ion allowing the assignee six months to file schedules was not intended as a condition, the breach of which would invalidate the assignment. *Produce Bank v. Morton*, 67 N. Y. 199, 203; s. c. 49 How. Pr. 277.

The act of 1877 made another change, and provided that in case the inventory should not be made and filed within thirty days the assignment should be void. Laws of 1877, ch. 466, § 3. This provision was repealed by the amendatory act of 1878 (Laws of 1878, ch. 318), and the section was put into the form cited above (*ante*, § 273), by which, upon a failure to file the inventory and schedules, the assignee becomes liable to removal.

§ 275. *Schedules previous to the act of 1860.*—Previous to the act of 1860 it was customary to draw the assignment with special references to schedules of the debtor's property which were intended to be annexed, and with reference to schedules of creditors who were provided for in the assignment. This was merely as a matter of convenience, to avoid the necessity for a description of the property and the designation of the creditors in the body of the assignment. There is no objection to pursuing such a course still. It will often be found convenient, where preferences are given to classes of creditors, to specify the various debts in their order of priority of payment, by schedules annexed to the assignment. Where schedules are thus used as a part of the instrument, we have already considered the effect of a failure to annex them at the time of the execution of the assignment. (See *ante*, §§ 156, 157, 161.)

The schedules so used as part of the assignment do not supply the place of the inventory and schedule required by the act. The act requires that the assignment shall be recorded in the county clerk's office of the proper county. (See *ante*, § 151.) The inventory and schedules required by the act are to be delivered to the county judge, and by him filed in the office of the clerk of the county in which the assignment is recorded. (See *ante*, § 273.)

§ 276. *The inventory and schedule are part of the assignment.*—Although the inventory and schedule required by the

act do not accompany the assignment, and are not referred to in it, and in fact may not be prepared until several days after the execution of the assignment, yet, when they are prepared and verified by the assignor, and delivered to the judge and filed as required by the act, they are to be regarded as part of the assignment so far as they designate the creditors to be paid, and the amount of their debts. *Terry v. Butler*, 43 Barb. 395, 398.

Hence, when the schedule subsequently filed by the assignor contained fictitious debts, the assignment itself was regarded as providing for the payment of such debts, and was therefore held void. *Terry v. Butler*, *supra*. So, when the schedule of property was prepared and filed pursuant to the act, and the assignor withheld from the schedule about \$15,000 of his property so as to enable the assignee to give the requisite security, and it also appeared that there was a direction to pay one creditor a little over \$2,000, when, in point of fact, the actual indebtedness to such creditor was \$1,400, the assignment was declared fraudulent and void. *De Camp v. Marshall*, 2 Abb. Pr. N. S. 373.

But when the inventory and schedules are prepared by the assignee under the provisions of the section cited (*ante*, § 273), there appears to be no reason why they should have such an effect.

§ 277. *Verification*.—When the inventory and schedules are made by the debtor, they must be verified by him to the effect that they are in all respects just and true (*ante*, § 273).

In the case of *Produce Bank v. Baldwin* (49 How. Pr. 277), it was held that an inventory and schedule properly verified before a competent officer was, under the act of 1860 as amended by the act of 1874, a pre-requisite to the vesting of a title in the assignee. In that case the verification was made before a notary public for Kings county, whose certificate had not been filed in New York. An appeal to the Court of Appeals was dismissed (*Produce Bank v. Morton* 67 N. Y. 199), but that court expressed the opinion that, assuming the verification to be bad, the assignment was valid notwithstanding the failure to make and verify the inventory and schedules.

If there are several debtors, each must join in the verification of the inventory. *Cook v. Kelly*, 14 Abb. Pr. 466.

When the inventory and schedules are prepared by the assignee, he is required to verify it to the effect that the same is in all respects just and true to the best of his knowledge and belief.

§ 278. *Preparation of schedules by assignee.*—The statute provides (*ante*, § 273), that, in case the debtor omit, neglect or refuse to make and deliver the inventory or schedule within the twenty days required, the assignee named in the assignment shall, within thirty days after the date thereof, cause to be made and delivered to the county judge of the county where such assignment is recorded, such inventory and schedule, in so far as he can; and for that purpose the county judge may, upon the application of the assignee, compel by order the assignor or any other person to appear before him and disclose, upon oath, any knowledge or information he may possess necessary to the proper making of such inventory or schedule. He may also compel a production of books and papers.

Previous to this statute it was held that where an assignor refused to furnish a schedule referred to in the assignment, a court of equity would sustain a bill against him for a discovery and to obtain a delivery of the books and securities. *Keyes v. Brush*, 2 Paige, 311; see *Van Hein v. Elkus*, 15 Supm. Ct. (3 Hun), 516–518; *Matter of Straus*, 1 Abb. N. C. 402.

§ 279. *Amendment of inventory or schedule.*—By the sixth section of the act of 1877 (Laws of 1877, chap. 466, as amended Laws of 1878, chap. 318, § 2), it is provided that “the county judge shall have power by order to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel, from time to time, supplemental inventories or schedules to be made and filed, within such time as he shall prescribe, and to enforce obedience to such orders by attachment.”

A mere omission in the inventory or schedules, if it occurs innocently, will not avoid the assignment. *Mathison v. Demarest*, 4 Robt. 161, 172; see *Butt v. Peck*, 1 Daly, 83.

§ 280. *Assignee's bond*.—By the fifth section of the act of 1877 (Laws of 1877, chap. 466, § 5), it is provided :

“The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York, in an amount to be ordered and directed by the county judge of the county where such assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee, and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded ; but in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said county judge by verified petition for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory as hereinbefore provided.” See Laws of 1860, chap. 348, § 3 ; Laws of 1875, chap. 56, § 1.

The provision of the act of 1860, as amended by Laws of 1875, ch. 56, was substantially the same, except that it required that the bond should be made within ten days after the delivery of the inventory and schedules, and it contained no provision in reference to a provisional bond.

§ 281. *Bond not essential to validity of assignment*.—The act does not make the giving of the statutory security by the assignees a condition precedent to the vesting of the estate in the trustees, nor does the failure to give the security within the time limited invalidate the transfer and restore the title of the assigned property to the assignors. *Brennan v. Willson*, 4 Abb. N. C. 279 (Ct. of Ap.) ; *Thrasher v. Bentley*, 1 Abb. N. C. 39 ; less fully, 59 N. Y. 649 ; *Syracuse, &c. R. R. Co. v. Collins*, 1 Abb. N. C. 47 ; 59 N. Y. 649 ; *Worthy v. Benham*, 20 Supm. Ct. (13 Hun), 176 ; *Van Hein v. Elkus*, 15 Id. (8 Hun), 576 ; *Hardmann v. Bowen*, 39 N. Y. 369 ; *Van Vleet v. Slauson*, 45 Barb. 317 ; *Evans v. Chapin*, 20 How. Pr. 289 ; *Barbour v. Everson*, 16 Abb. Pr. 366.

The cases of *Juliand v. Rathbone* (39 N. Y. 369), *Hodges v. Bungay* (10 Supm. Ct. [3 Hun], 594), *Fairchild v. Gwinne* (16 Abb. Pr. 366), so far as they hold a contrary doctrine, are overruled in *Brennan v. Willson*, *supra*.

§ 282. *Failure to file the bond*.—By the eighth section of the same act it is provided that “a failure to file any bond required by or under this act, or the acts hereby amended, within the specified time, will not deprive the county judge of his power over the assignee or the trust estate.” Laws of 1877, chap. 466, § 8.

§ 283. *Authority of assignee before giving bond*.—The section of the act cited above (*ante*, § 280) requires that the assignee shall give the bond required “before he shall have any power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property.”

An attempt on the part of the assignee to execute a conveyance of real property before giving the required bond is a nullity. *Brennan v. Willson*, 4 Abb. N. C. 279, 289. Until he has complied with the statute by giving the bond, his trust is but a dry trust, merely to take possession and hold the property until he becomes qualified and has authority under the statute to dispose of it, and convert it to the purposes of the trust. *Brennan v. Willson*, *supra*.

An inchoate right to the property would in the mean time vest in the assignees for the purposes of the trust, although they are not empowered to dispose of it until the required bond is given. *Van Hein v. Elkus*, 15 Supm. Ct. (8 Hun), 516, 518.

§ 284. *The form and amount of the bond*.—One object of the inventory is to aid in determining the amount of the bond to be given. *Van Hein v. Elkus*, 15 Supm. Ct. (8 Hun), 516, 518. The judge may, however, in his discretion, require that other proof should be presented to him to enable him to fix the proper penalty of the bond. In addition to the affidavit annexed to the inventory and schedules, the rules of the Court of Common Pleas for the city and county of New York require

that "Every bond required to be given by an assignee under the act of April 13, 1860 (the same rule continues under the act of 1877), respecting voluntary assignments for the benefit of creditors, must specify the place of residence of each surety named therein, at the time of presenting it for approval; it must be accompanied by an affidavit showing the nominal value, and also the actual value of the property assigned; and no bond will be hereafter approved until these requirements are complied with. No bond will be approved until the schedules of assets and liabilities have been filed, unless satisfactory proof by affidavit be produced, showing the reason of not filing the same." Rule XX. Another rule provides that "No bond or undertaking will be allowed to be filed by the clerk of this court in his office, unless the same be legibly written, and all interlineations or erasures therein duly noted as having been made before the execution thereof." Rule XXI.

In accordance with the first of the rules cited, at the time of presenting the inventory and schedules to the judge, for the purpose of having him name the penalty to be inserted in the bond, proof should also be presented, in the form of affidavits of the assignor or of the assignee, or of some person acquainted with the character and value of the property, setting out in full a description of the character of the assigned property, and its nominal and actual value, with such detail and particularity as the circumstances of the case require.

The sufficiency of the sureties is left to the discretion of the judge. It is customary, in New York, to require at least two sureties, and that the sureties together should justify in at least double the penalty of the bond. It is made the duty of the officer to require that personal sureties should justify (Court Rules, No. 5), and the same rule requires that the bond should be duly proved or acknowledged, in like manner as deeds of real estate, before they can be received or filed. See Code of Pro. § 810.

§ 285. *Provisional bond.*—The last clause of the section cited (*ante* § 280) is intended to meet a case where the assignor has failed to file the inventory and schedule, and the assignee is unable to prepare the same, while the exigencies of the estate may require that he should be at once clothed with all the

powers which he can exercise only upon giving security. In order to enable the assignee to give such security and to afterwards proceed to the preparation of a proper inventory and schedules, he may, upon petition presented to the county judge, be authorized to file a provisional bond until such time as he may be able to present the schedules or inventory provided for. The petition should set out the particulars of the assignment, the reason why the inventory and schedules have not been filed and cannot be filed, a detailed statement of all the assets covered by the assignment as fully as the assignee has been able to obtain information in reference to it, the incumbrances on the property and the amount of the liabilities. For the purpose of obtaining the information necessary to prepare this petition, the assignee, under the third section of the act (*ante*, § 273), may apply for and obtain an order from the county judge requiring the assignor and any other person to appear and disclose any knowledge or information they may possess.

§ 286. *Liability of sureties.*—The condition of the bond “is for the faithful discharge of the duties of the assignee and for the due accounting for all moneys received by him.” The liability on the bond is for the discharge of the assignee’s duties *under the assignment*, and not for his responsibility for the assigned property in case the assignment is set aside. *People v. Chalmers*, 8 Supm. Ct. (1 Hun), 683; *aff’d* 60 N. Y. 154. In the case cited, Mr. Justice Daniels says: “The remedy is clearly provided for, and confined to those creditors claiming a benefit under the terms of the assignment itself. And that design is still further exhibited by the provisions made concerning the action which may be brought upon the bond. (See *post*, § 287.) For it is only when the assignee shall omit or refuse to perform any decree or order made against him for the payment of a debt out of the trust fund, by a judge or court having jurisdiction, that the bond can be ordered to be prosecuted. The default for which that can be done is limited to the non-performance of the decree or order requiring payment to be made out of the trust fund provided for and contemplated by the assignment. And it clearly presupposes the continuance and execution of the trusts mentioned in it.”

§ 287. *Prosecution of assignee's bond.*—"Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied, by direction of the county judge, in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee." Laws of 1877, ch. 466.

Compare similar provision in relation to bonds of executors and administrators, 3 Rev. Stat. 6th ed. 125, § 19.

See Laws of 1860, ch. 348, § 5; Laws of 1873, ch. 363. Under the former acts the bond was prosecuted in the name of the people by the district attorney of the county where the bond was filed.

§ 288. *Additional security.*—"The county judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee and surety, require further security to be given whenever in his judgment the security afforded by the bond on file is not adequate." Laws of 1877, ch. 416, § 7.

Compare similar provisions in case of executors and administrators, 3 Rev. Stat. 6th ed. 84, §§ 62, 63, 64, 65, 72.

CHAPTER XXI.

POWERS AND DUTIES OF ASSIGNEES IN GENERAL.

§ 289. *Distinction between voluntary assignees and assignees of insolvent debtors under the Revised Statutes.*—The powers, duties and obligations of trustees and assignees appointed under the statutory proceedings, set out in Parts I and II of this work, are declared in article eight, of title 1, of chapter 5, of the first part of the Revised Statutes. The provisions of that article, except so far as they are declaratory merely of the common law, have no applicability to assignees under general voluntary assignments for the benefit of creditors. This fact must be constantly borne in mind, and the provisions referring exclusively to trustees of insolvent debtors under the Revised Statutes must be distinguished from the general principles stated as applicable to assignees in general.

§ 290. *Assignees of insolvent debtors under the Revised Statutes ; Oath ; When vested with property.*—The Revised Statutes provide that “all assignees and trustees appointed under any authority conferred by any of the provisions of the previous articles of this title, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed for the benefit of his creditors ; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared in respect to trustees.” 2 R. S. 40, § 1 ; 3 R. S. 6th ed. 35, § 1 ; 2 Edm. 42 ; 1 Fay’s Dig. 387.

“Before proceeding to the discharge of any of their duties, all such trustees shall take and subscribe an oath that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding,

which oath shall be filed with the officer or court that appointed them." 2 R. S. 41, § 5; 3 R. S. 6th ed. 36, § 5; 2 Edm. 42; 1 Fay's Dig. 387.

"The trustees taking such an oath shall be deemed vested with all the estate, real and personal, of such debtor (except such as is exempted by the preceding articles), as follows:

"1. In proceedings under the first article, from the publication of the notice to the non-resident, absconding or concealed debtor.¹

"2. In proceedings under second article, from the appointment of trustees.²

"3. In proceedings under the third,³ fifth⁴ and sixth⁵ articles, from the execution of the assignment in those articles directed.

"4. In proceedings under the fourth⁶ article, when the assignment was voluntary, from the time of its execution by an officer as therein directed, from the time of the first publication of the notice in that article required to be given to creditors." 2 R. S. 41, § 6; 3 R. S. 6th ed. 36, § 8; 2 Edm. 42; 1 Fay's Dig. 387.

Taking the oath is a prerequisite to the complete vesting of the title in the assignee. The presumption, when the assignee actually enters upon the discharge of his duties, is that he took the oath. *Hoag v. Hoag*, 35 N. Y. 469, 474, 475. But without such evidence that he entered upon the discharge of his duties, no presumption can be indulged in that he took the oath. *Rockwell v. Brown*, 42 How. Pr. 226, 227.

§ 291. *Powers of trustees of insolvent debtors under the Revised Statutes.*—The statute also provides, in reference to trustees appointed in the various statutory proceedings, that "the said trustees shall have power:

"1. To sue in their own names, or otherwise, and recover all the estate, debts, and things in action, belonging or due to such

¹ Repealed Laws of 1877, chap. 417.

² 2 R. S. part 2, chap. 5, title 1, art. 2.

³ *Ante*, Chapters II, III and IV.

⁴ *Ante*, Chapter VI.

⁵ *Ante*, Chapter VII.

⁶ *Ante*, Chapter V.

debtor, in the same manner and with the like effect as such debtor might or could have done if no attachment had been issued, or trustees appointed, or an assignment had not been made; and no set-off shall be allowed in any such suit for any debt, unless it was owing to such creditor by such debtor before the first publication of the notice required in the first article,¹ or before the appointment of trustees under the second article,² or before presenting the petition of the insolvent under third,³ fifth,⁴ and sixth⁵ articles, or before the publication of notice to creditors under the fourth⁶ article. But no suit in equity shall be brought by assignees of insolvents under the third, fourth or fifth articles, without the consent of the creditors having a major part of the debts, which shall have been exhibited and allowed, unless the sum in controversy exceeds five hundred dollars.

“2. To take into their hands all the estate of such debtor, whether attached or delivered to them, or afterwards discovered, and all books, vouchers and securities relating to the same.

“3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of any sheriff who shall have attached any of the property of such debtor, or who shall have in his hands any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges for attaching and keeping the same, to be all allowed by the officer having jurisdiction.

“4. From time to time to sell at public auction all the estate, real and personal, vested in them which shall come to their hands, after giving at least fourteen days public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper printed in the county where the sale shall be made, if there be one.

“5. To allow such credit on the sale of real property by them as they shall deem reasonable, not exceeding eighteen months

¹ Repealed Laws of 1877, chap. 417.

² 2 R. S. part 2, chap. 5, title 1, art. 2.

³ *Ante*, Chapters II, III and IV.

⁴ *Ante*, Chapter VI.

⁵ *Ante*, Chapter VII.

⁶ *Ante*, Chapter V.

for not more than three-fourths of the purchase money ; which credit shall be secured by a bond of a purchaser and a mortgage on the property sold.

“ 6. On such sales, to execute the necessary conveyances and bill of sale.

“ 7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments which may be an incumbrance on any property so sold by them ; or to sell such property subject to such mortgages, contracts, pledges or judgments.

“ 8. To settle all matters and accounts between such debtor and his debtors or creditors, and to examine any person touching such matters and accounts on oath to be administered by either of them.

“ 9. Under the order of the officer appointing them, to compound with any person indebted to such debtor, and thereupon to discharge all demand against such person.” 2 R. S. 41, § 7 ; 3 R. S. 6th ed. 37 ; 2 Edm. 43 ; 1 Fay’s Dig. 387.

Under the authority of the first paragraph of this section, the assignee may maintain an action against the sheriff for suffering goods attached by him to be lost through his negligence. *Acker v. Witherell*, 4 Hill, 112. And he may maintain trover for the conversion of the personal property of the debtor before his appointment. *Gillet v. Fairchild*, 4 Den. 80.

The provisions of the statute in reference to the sale of the property are mandatory, and the court has no power to release the assignee from complying with the statute, or to require him to perform his duties in any other manner. *Hackley v. Draper*, 4 Supm. Ct. (T. & C.) 614 ; see *Libby v. Rosekrans*, 55 Barb. 202. In *Hackley v. Draper* (*supra*), when a receiver of an insolvent corporation, who has by law (2 R. S. 469) the same power and authority conferred upon trustees of the estates of insolvent debtors, made application to, and obtained the order of the special term of the Supreme Court, authorizing him as receiver, to sell certain of the trust property at public or private sale in his discretion, and upon such terms as he should deem best, it was held that a private sale consummated in pursuance of the order, was not merely voidable, but absolutely

void. But an order directing the receiver, under like circumstances, as to the manner in which he should proceed in giving notice of and making the sale, and which directs him to proceed in compliance with the requirements of the statute, does not prejudice the sale. *Libby v. Rosekrans, supra.*

Trustees are entitled to redeem the lands of the debtor of whose estate they have charge; but such redemption does not entitle them to a deed of the property sold, or authorize them to direct the execution of the deed to a third person. Its effect is the same as would be a redemption by the debtor himself, and not otherwise. *Phyfe v. Riley, 15 Wend. 248.*

When the demand of a creditor is unliquidated, it is competent to the trustees to assess and determine the damages of the creditor in the same manner as a jury would do in an action of covenant. *Matter of Negus, 7 Wend. 499.* The decision of the trustees in determining the amount due to the several creditors will, however, be reviewed by the Supreme Court.

If they err in the application of a principle of law, the court will correct the error; but if they err on a question of fact or opinion, as in the assessment of unliquidated damages, their decision will be set aside if clearly against the weight of evidence, but not otherwise. *Matter of Negus, supra.* The court will not enjoin the proceedings of the trustee. If they do not comply with their duty, the creditor's remedy is by summary application to the Supreme Court. *Huyler v. Westervelt, 7 Paige, 155.*

§ 292. *Rights of assignee under voluntary assignment.*—The assignee under a general assignment takes the legal title to the property conveyed. His interest is that merely of a trustee; the beneficial interest is in the creditors provided for. But neither the assignee nor the creditor part with any existing right in consideration of the assignment. They merely take what the conveyance gives. Hence, the assignee is not a purchaser for value. The property is subject to the same liens and equities in his hands which existed against it before the execution of the assignment. *Leger v. Bonaffe, 2 Barb. 475; Haggerty v. Palmer, 6 Johns. Ch. 437; In re Howe, 1 Paige,*

125 ; *Addison v. Bruckmeyer*, 4 Sandf. Ch. 531 ; *Corning v. White*, 2 Paige, 367 ; *Blydenburgh v. Thayer*, 3 Keyes, 293 ; s. c. 34 How. Pr. 88 ; *Bush v. Lathrop*, 22 N. Y. 535 ; *Schieffelin v. Hawkins*, 14 Abb. Pr. 112 ; *Warren v. Fenn*, 28 Barb. 333 ; *Van Heusen v. Radcliff*, 17 N. Y. 580.

Thus he takes property subject to the lien of a creditor which has attached by the filing of a bill in equity before the assignment (*Corning v. White*, 2 Paige, 567), and subject to the lien of a judgment (*Livingston v. Livingston*, 2 Caines' Cas. 300) and levy. *Slade v. Van Vechten*, 11 Paige, 21. He takes land subject to the equitable lien of the vendor for purchase money (*Warren v. Fenn*, 28 Barb. 333), and subject to the lien of an equitable mortgage. *In re Howe*, 1 Paige, 125. So he takes goods subject to any right of stoppage *in transitu* which may exist against his assignor (*Harris v. Pratt*, 17 N. Y. 249 ; aff'g *Harris v. Hart*, 6 Duer, 606 ; see *Clark v. Mauran*, 3 Paige, 373), and subject to any conditions or equitable rights existing between the assignor and his vendor. *Haggerty v. Palmer*, 6 Johns. Ch. 437. The assignee of a factor is under the same obligation to restore to a consignor the proceeds of his goods which are distinguishable as the factor himself. *Francklyn v. Sprague*, 17 Supm. Ct. (10 Hun), 589. The assignee, however, is entitled to retain in his hands the proceeds of goods sold by the factor, until the notes or acceptances of the factor are paid or canceled. *Francklyn v. Sprague*, *supra* ; *Addison v. Bruckmeyer*, 4 Sandf. Ch. 531.

The assignee is not a *bona fide* purchaser within the purview of the act respecting the filing of chattel mortgages, and he takes the property subject to the lien of such mortgage. Thus, where the debtor had executed a chattel mortgage on certain furniture as security for rent, and the mortgage was unrecorded, and the debtor subsequently executed a general assignment, it was held that he could not hold the proceeds of the furniture against the assignee of the lease. *Van Heusen v. Radcliff*, 17 N. Y. 580. A contrary view was expressed by Chan. Kent, in *Dey v. Dunham* (2 Johns. Ch. 188), reversed on other grounds in 15 Johns. 555.

But the rule laid down in the Court of Appeals is the prevailing doctrine. See *In re Collins*, 12 N. B. R. 379 ; *Platt*

v. *Stewart*, 13 Blatch. 481 ; see also *Barker v. Smith*, 12 N. B. R. 474 ; *Wilkins v. Davis*, 15 Id. 60.

Where a person had contracted to build certain houses for a stipulated sum, to be paid in part during the progress of the work, and in full upon the completion of the buildings, and during the performance of work the contractor executed a general assignment, and the plaintiff, subsequent to the execution of the assignment, acquired a mechanic's lien upon the premises, it was held that the fact of the assignment did not change the relations between the contractor and the owner. The assignee was not thereby substituted in the place of the contractor, nor did he contract any obligations to perform the contract, or acquire any rights to the money to become due on its performance, beyond the balance which might remain after the defendants had retained enough to discharge such sums as were due to persons who had performed work on the buildings, and acquired a right to be paid under the statute. *Mandeville v. Reed*, 13 Abb. Pr. 173.

So he acquires no higher rights by the transfer of negotiable paper to him than the assignor had. If the assignor could not maintain an action on such paper, his assignee cannot. *Reed v. Sands*, 37 Barb. 185.

And where an execution is in the hands of the sheriff at the time of the execution of a general assignment of the property of the defendant, for the payment of his debts, the lien of the execution upon the personal property liable to seizure and sale thereon, is paramount to the title of the general assignee. The assignee is not a *bona fide* purchaser within the intent and meaning of the Revised Statutes, which protect the title of *bona fide* purchasers who have purchased between the delivery of the execution to the sheriff and an actual levy upon the property. *Slade v. Van Vechten*, 11 Paige, 21 ; see Code, §§ 1405, 1409.

§ 293. *Duties of the assignee.*—It is said by Mr. Justice Robinson, in *Levy's Accounting* (1 Abb. N. C. 177), that “the position and office of an assignee for the benefit of creditors has become more and more, with occurring legislation, that of a *quasi* public officer. *Nichols v. McEwen*, 19 N. Y. 27. Instead of being, as at common law, the mere agent and trustee

of the immediate parties to the assignment, his duties 'are very much such as a sheriff may perform under an execution' (*Nichols v. McEwen, supra*), and he is now subjected to such jurisdiction in the county court as the surrogate exercises over an executor or administrator in compelling an account; in settling the same, and adjudging payment of any debt out of the trust fund; and to his summary removal and substitution of another trustee by reason of his insolvency, or for other cause, &c., by a court of equity (1 R. S. 730, § 70), on petition or complaint."

But it is not to be understood that the assignee can exercise any other or different rights, or has any other powers than those which he derives as trustee under the deed of trust. These are of a two-fold character: (1) The collection and sale of the assigned property; and (2) the distribution of the proceeds among the creditors entitled. These matters are made the subject of distinct discussion in succeeding chapters.

The duties of an assignee in general are those of a trustee, and he is held to the responsibilities and duties of a trustee under the control of a court of equity.

A trustee is bound to manage the trust property for the benefit of his *cestuis que trust* with the care and diligence of a provident owner. *Litchfield v. White*, 7 N. Y. 438, 443; *Jacobs v. Allen*, 18 Barb. 549. The fact that he receives a compensation for his services distinguishes his liability from that of a gratuitous bailee. He stands, therefore, in regard to his obligation to exercise diligence, in the light of a paid agent for the parties interested, and not in that of a gratuitous bailee or trustee. *Litchfield v. White, supra*. But he should be held to no higher degree of diligence than that which governs cautious and prudent men in the management of their own affairs. Otherwise the office of trustee would be one of such hazardous responsibility that no prudent or competent man would ever accept it. *Higgins v. Whitson*, 20 Barb. 141, 146.

No principle is better settled than this, that trustees cannot be permitted to hold a position hostile to the trust. Upon this principle it was held, by Chan. Kent, in the case of *Hawley v. Mancius* (7 Johns. Ch. 174), that an assignee, who is also a judgment creditor, cannot take out an execution upon his judg-

ment against the assigned property in his hands as trustee. See *ante*, § 148; see also *Colburn v. Morton*, 1 Abb. Dec. 378.

§ 294. *Application to the court for instructions.*—A trustee in honest doubt as to his powers, may apply to a court of equity to define them and give judicial sanction to his acts. *Anon v. Gelpcke*, 12 Supm. Ct. (5 Hun), 245; *Wiswell v. First Congregational Church*, 14 Ohio St. 18, 43; *Petition of Baptist Church*, 51 N. H. 424; Perry on Trusts, 2d ed. § 476a; Hill on Trustees, 488. This is frequently done by suit in equity, to obtain a construction of a will, or for directions in respect to investments or changes of securities. *Woodruff v. Cook*, 47 Barb. 304; *Manice v. Manice*, 43 N. Y. 303; *Atty.-Gen. v. Moore*, 4 C. E. Green (N. J.), 503; *Goodhue v. Clark*, 37 N. H. 525. But the rule is general and applicable to all trustees. The application may be either by bill in equity or by petition. *Petition of Baptist Church*, 51 N. H. 424; *Codwise v. Gelston*, 10 Johns. 521. The fullest exposition of the subject is that of Mr. Justice Daniels, in *Anon v. Gelpcke* (12 Supm. Ct. [5 Hun], 245, 251). He says: "It has been the common practice for courts of equity to advise and direct trustees as to the discharge of their duties when that may be so much involved in doubt as to render it necessary, and when the order may not have the effect of determining controverted rights, notice of the application for it does not seem to have been and probably would not be indispensable to its validity. For, in that class of cases it is at most permissive and advisory, adding or refusing the sanction of the court to the judgment or convictions of the trustees as to what may be judicious under the circumstances presented for consideration. It is simply evidence of their care and good faith in doing what may be deemed best in the execution of the trust. That was the nature of the course pursued in *Curtis v. Leavitt* (1 Abb. 274), and *Matter of Croton Ins. Co.* (2 Barb. Ch. Rep. 642). But where controverted rights or doubtful acts are to be determined, that practice would be altogether improper. For it would oppose the fundamental principle which protects parties against the consequences of judicial proceedings of which they may have had no notice. To render them controlling and obligatory in that class of cases, not only notice but

an opportunity to oppose the application to be made, are both matters of vital necessity. *Store v. Miller*, 62 Barb. 431; *People v. Soper*, 3 Seld. 428-431. Consequently important rights are never judicially determined without securing to the parties to be affected such a hearing as may afford them complete and ample protection against an erroneous or improper adjudication. And trustees have been required to observe this principle in the applications which they have found it necessary to make for their guidance in doubtful cases. In the case of Christ Church in Londonderry, the petition was presented on notice (5 N. H. 424). In *Wheeler v. Perry* (18 Id. 307), the proceeding was by bill. *Dimmock v. Bixby* (20 Pick. 368), was the same. See also *Freeman v. Cook*, 6 Iredell Eq. 373; Burrill on Assignments, 2d ed. 557, 3d ed. 589, 590; 2 Perry on Trusts, 2d ed. §§ 476a, 928. So far as the practice has been indicated it has usually been by bill of complaint, and when the less formal course by petition has been taken, it has been accompanied by notice to the parties interested in opposing it. And that is required by the principle which protects all parties against condemnation or prejudice to any of their rights, without the opportunity of first being heard. No good reason exists why trustees should be exempted from its control, but, on the contrary, that good faith and caution which have always been required from them should certainly subject them to its control." The application, if in a collateral matter, may be either by petition or by bill. *Codwise v. Gelston*, 10 Johns. 507. It must be addressed to a court of equity. *Shipman's Petition*, 1 Abb. N. C. 406. Except where the statute provides otherwise (see *post*, chap. XXIII, Compromise of Claims).

§ 295. *Joint assignees*.—Where several persons are named as trustees, and one of them refuses to accept and execute the trust, the whole estate will vest in the others, who act in the same manner as if he were dead or had not been named as a trustee. *King v. Donnelly*, 5 Paige, 46. This is the general rule in reference to trustees. *Leggett v. Hunter*, 19 N. Y. 445; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Matter of Stevenson*, 3 Paige, 420; *Matter of Van Schoonhoven*, 5 Id. 559; *Moir v. Brown*, 14 Barb. 39.

The trustees who do accept must perform their duties in their joint capacity ; they must all act. *Brennan v. Willson*, 4 Abb. N. C. 279 ; *Shook v. Shook*, 19 Barb. 653 ; *De Peyster v. Ferrers*, 11 Paige, 13 ; *Ridgeley v. Johnson*, 11 Barb. 527 ; *Sinclair v. Jackson*, 8 Cow. 544 ; *Franklin v. Osgood*, 14 Johns. 527. They cannot, like executors, act separately ; all must join, both in receipts and conveyances. . *Ridgeley v. Johnson*, *supra*.

They constitute in law but one person, and must all unite in bringing an action. *Thatcher v. Candee*, 4 Abb. Dec. 387 ; *Brinckerhoff v. Wemple*, 1 Wend. 470. Or in making a sale of the property. *Brennan v. Willson*, 4 Abb. N. C. 279 ; *Sinclair v. Jackson*, 8 Cow. 543 ; Perry on Trusts, 2d ed. § 411 ; Hill on Trustees, 3d Am. ed. 305. Or in making a compromise of a claim due the estate. *Anon v. Gelpcke*, 12 N. Y. Supm. Ct. (5 Hun), 245, 255.

If one trustee becomes incompetent to act by reason of lunacy or other inability, the others cannot act without him. The only remedy is by an application to the court to remove the incompetent trustee. *Matter of Wadsworth*, 2 Barb. Ch. 381. And in a recent case under the assignment act, where one of three assignees was incompetent to join in a conveyance, because he had failed to give the security required by the act, it was held that the others were unable to make a valid conveyance without him. *Brennan v. Willson*, 4 Abb. N. C. 279. An assignee cannot divest himself of the obligation to perform the duties of the trust without an order of the court or the consent of all the *cestuis que trust*. *Thatcher v. Candee*, 4 Abb. Dec. 387 ; s. c. 3 Keyes, 157 ; *Shepherd v. McEvers*, 4 Johns. Ch. 136 ; *Cruger v. Halliday*, 11 Paige, 314 ; *Ridgeley v. Johnson*, 11 Barb. 527.

Upon the death of one of the joint assignees the office survives, and all the interest in the trust property vests in the survivors, and they may exercise all the powers. *Shook v. Shook*, 19 Barb. 653 ; *Belmont v. O'Brien*, 12 N. Y. 394. Upon the death of the last survivor at common law, the trust property, if real estate, passed to the heir or devisee ; and if personal, it went, by operation of law, to the executor or administrator of the trustee charged with the trust. *De Peyster v. Ferrers*, 11 Paige, 13. But the Revised Statutes provide that " Upon the

death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives ; but the trust, if then unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court." 1 R. S. 730, § 68 ; 2 R. S. 6th ed. 1110, § 81. This provision has been held not to be applicable to personal property (see *post*, chap. ~~XXIII~~^{IV}).

§ 296. *Joint trustees of insolvent debtors under Revised Statutes.*—The provisions of the Revised Statutes, in reference to the powers, duties and obligations of trustees of insolvent debtors apply where there are several trustees as well as where there is only one. 2 R. S. 41, § 2 ; 3 R. S. 6th ed. 36, § 2 ; 2 Edm. 42 ; 1 Fay's Dig. 387.

The statute also provides that "Where there are more trustees than one appointed, the debts and property of the debtor may be collected and secured by any one of them, and when there are more than two trustees appointed, every power and authority conferred by this title on the trustees may be exercised by any two of them." 2 R. S. 41, § 3 ; 3 R. S. 6th ed. 36, § 3 ; 2 Edm. 42 ; 1 Fay's Dig. 387.

"The survivor or survivors of any trustees shall have the powers and rights given by this title to trustees. All property in the hands of any trustee at the time of his death, removal or incapacity, shall be delivered to the remaining trustee or trustees if there be any, or to the successor of the one dying, removed, or incapacitated, who may demand and sue for the same." 2 R. S. 41, § 3 ; 3 R. S. 6th ed. 36, § 4 ; 2 Edm. 42 ; 1 Fay's Dig. 387.

CHAPTER XXII.

TAKING POSSESSION AND CUSTODY OF THE ASSIGNED PROPERTY.

§ 297. *In general.*—The first duty of the assignee, after accepting the trust, is to take possession of the assigned property, and provide for its safe-keeping until such time as it can be brought properly to sale. The assignee being bound to exercise the care of a provident owner, must exercise such discretion in the protection of the property as the circumstances of each particular case may require. On the part of the assignor no act should be omitted which can serve to express an absolute transfer of the possession, and an entire renunciation of all control over the property, so as to give every quality of reality and good faith to the transaction.

§ 298. *Manner of taking possession.*—We have already had occasion to refer to the necessity of a change of possession as affecting the validity of the assignment. (See *ante*, § 231).

The duty of the assignee requires that he should proceed at once to secure the actual possession of the property. He should assume command of it, and should employ his own agents to watch over and care for it. He should demand possession of the books of account and evidences of indebtedness which have been transferred to him. He should examine the extent and particulars of the assigned property, and if no inventory has been made, his first business is to make, or cause to be made, an exact inventory of the assets. *Cram v. Mitchell*, 1 Sandf. Ch. 251. If an inventory has been made, he should verify it at once, so that he may not, when afterwards charged with the contents of the inventory, be without evidence of the amount and character of the property, which was, in point of fact, transferred to him.

In like manner he should, for his own protection, cause the property to be appraised or examined by persons familiar with

the value of like property, so that he may be able, on an accounting, to furnish proof of value.

§ 299. *Continued change of possession.*—An assignment unaccompanied by an immediate delivery, and not followed by an actual and continued change of possession, of the assigned property is, as we have seen (*ante*, § 231), presumptively fraudulent and void as against creditors. But it is not only the debtor's duty to deliver the property to the assignee, it is the assignee's duty to take and retain possession.

Where, after an assignment of a stock of goods, the assignees permitted the assignor to retain the possession of the goods, and collect the debts for them, without any visible change in the mode of doing business at the store, this was held insufficient. And it was said that a construction of the statute which would allow the vendor or assignor of a store of goods to continue in possession and to sell them out as the agent of the purchaser, would render the statutory provision for the prevention and detection of frauds a mere nullity. *Butler v. Stoddard*, 7 Paige, 163, 166; *affi'd* 20 Wend. 507.

So, in another case, where the assignee permitted the assignor to conduct the business as his agent, and to buy and sell goods, and to receive and spend the receipts, this was held sufficient ground for an injunction and the appointment of a receiver. *Connah v. Sedgwick*, 1 Barb. 210.

So where the assignor, after the assignment, is permitted to sell the goods at retail, in the customary manner, and his name continues to remain upon the various signs of the store. *Pina v. Rikert*, 21 Barb. 469.

In *Bullis v. Montgomery* (50 N. Y. 353), the assignor received the key of the building where the goods were, and unlocked the door, but did not go in, the sheriff subsequently seized the goods on a writ of replevin in an action against the assignor, the assignee sued for trespass, it was held that, though he had a valid transfer of title, and there had been a symbolical delivery and constructive possession, yet the actual possession had not departed from the assignor, and the sheriff therefore was protected by his process in seizing the property.

So moneys received from the assigned property cannot be

paid over to the assignor ; it is the assignee's duty to receive it. *Currie v. Hart*, 2 Sandf. Ch. 353.

A mere perfunctory ceremony, such as the delivery of the key of a store, where the assignor and his clerks are permitted to continue selling the goods and transacting the business as before, will not be enough. *Adams v. Davidson*, 10 N. Y. 309.

§ 300. *Of the custody of the property.*—Until a sale can be effected, it is the duty of the assignee to preserve and protect the assigned property, so that it may be disposed of to the best advantage. *McQueen v. Babcock*, 41 Barb. 337.

He not only may, but should insure the property. *Whitney v. Krows*, 11 Barb. 198, 201, 202. If the property is already insured under the usual form of policy, which provides that in case of any assignment, transfer, or termination of the interest of the assured, without the consent of the insurer, the policy shall become void, an assignment for the benefit of creditors will terminate the policy. *Mellen v. Hamilton Fire Ins. Co.* 17 N. Y. 609 ; *Dey v. Poughkeepsie Mut. Ins. Co.* 23 Barb. 623. See *People v. Beigler*, Hill & D. Sup. 133. Hence the assignee should at once obtain the consent of the insurer when the policies are transferred to him, or cancel them and take out new policies.

Assignees have the right to relieve the property from prior liens, if, in the fair exercise of their discretion, they deem it for the best interests of the creditors. *Whitney v. Krows*, 11 Barb. 198, 202. But they cannot use the trust property for the purpose of erecting buildings, and making alterations and repairs upon real estate. *Hitchcock v. Cadmus*, 2 Barb. 381.

Trustees of insolvent debtors, under the Revised Statutes, are expressly empowered to pay off incumbrances. 2 R. S. 42, § 7 ; 3 R. S. 6th ed. 37, § 9.

§ 301. *Of the care of intangible property.*—If the assigned property consists in part of notes, bonds, policies of insurance and other similar choses in action, notice should be given to the promisors, obligors and makers of the instruments. Perry on Trusts, 2d ed. § 438. For, although no notice is necessary to

perfect the assignment, yet, in default of notice, if the assignor's debtor in good faith pay the debt to the assignor, it will be a good payment and discharge him from further liability. *Beckwith v. Union Bank*, 9 N. Y. 211; aff'g 4 Sandf. 604; and see *ante*, § 262, and cases cited. It is the duty of the assignee forthwith to reduce all choses in action to possession, and if he unreasonably delay collection he will make himself personally liable. *Winn v. Crosby*, 52 How. Pr. 174.

§ 302. *Custody and care of the trust funds.*—It is the duty of the assignee to keep the trust funds entirely separate and distinct from their own moneys. *Duffy v. Duncan*, 32 Barb. 587; aff'd 35 N. Y. 187.

If deposited in a bank, it should be deposited to a separate account, and in the name of the trustee, as such, to the end that the fund may at all times be traced and identified. *Duffy v. Duncan*, 32 Barb. 587. If he deposits it in his own name in a bank, and the bank becomes insolvent, the loss will fall on the trustee. *Matter of Stafford*, 11 Barb. 353.

If the assignees make use of the trust fund, or mingle it with their own money, they make themselves liable not only to make good all losses which may occur, but also to pay interest on the money whether it earn any or not. *Mumford v. Murray*, 6 Johns. Ch. 1; *Case v. Abeel*, 1 Paige, 393; *Hood's Estate*, 1 Tuck. 396; *Utica Insurance Co. v. Lynch*, 11 Paige, 520; *Manning v. Manning*, 1 Johns. Ch. 527.

The trustee cannot loan the trust money on personal security, nor can he invest it for any purposes of trade or speculation. *Smith v. Smith*, 4 Johns. Ch. 281; *King v. Talbott*, 40 N. Y. 96; s. c. 50 Barb. 453; *Flagg v. Ely*, 1 Edm. 206; see Perry on Trusts, 2d ed. §§ 453, 454, 459, 464. And if he makes any use of it, all the profit which he makes will enure to the estate, while he will be personally charged for any loss as well as for interest. *Norris' Appeal*, 71 Penn. St. 106; *Brown v. Rickerts*, 4 Johns. Ch. 303.

It is the duty of an assignee for the benefit of creditors to pay the money received by them over to the creditors without delay. If for any sufficient reason they retain the money, it should be invested so as to render it productive, and if they

neglect to pay it over or invest it, they will be charged with interest. *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508.

§ 303. *Duty to keep accounts.*—A trustee is bound to keep clear, distinct and accurate accounts. Perry on Trusts, 2d ed. § 821. If an assignee for creditors keep his accounts in a negligent way, or keep no account whatever of his receipts, all presumptions will be strongly against him, and obscurities and doubts will not operate to his advantage, but adversely. *Blauvelt v. Ackerman*, 23 N. J. Eq. 495.

And where a trustee refused to render an account of his receipts of rents, he was held chargeable with what in the opinion of the referee would be a reasonable rent. *Green v. Winter*, 1 Johns. Ch. 26.

And if he neglect to keep regular accounts, or mingle the trust funds with his own, he will be charged interest as if the fund had been kept invested upon interest. *Spear v. Tinkham*, 2 Barb. Ch. 211.

§ 304. *The right to reject property.*—"It has long been a recognized principle of the bankrupt law, that the assignees of a bankrupt were not bound to take property of an onerous or unprofitable character—to accept in fact, a *damnosa hæreditas*." Robson's Law of Bank. 375. A provision in reference to such property is incorporated into the English bankrupt law. (32 and 33 Vict. ch. 71, § 23.) In *Carter v. Warne* (4 Car. & Pay. 191), it was held by Lord Tenterden, that assignees under an assignment for the benefit of creditors are to be considered in the same situation in this respect with assignees of a bankrupt.

The right of the assignee to reject property has most frequently arisen in reference to leasehold property. (See *ante*, § 178, and cases there cited.) But the rule applies also to other property of an onerous character upon which the assignee may be required to expend money. Thus, in the case of an executory contract to manufacture goods for the assignor, it seems that the assignee is not bound to accept the goods and make himself liable for the purchase-money. *Van Dine v. Willett*, 38 Barb. 319.

And under the English bankrupt law the rule has been applied to shares of a corporation liable to further call. *Graham*

v. *Van Dieman's Land Co.*, 11 Exch. 101; *Laurence v. Knowles*, 5 Bing. (N. C.), 399. And the section of the English bankrupt law referred to extends to land of any tenure burdened with onerous covenants, unmarketable shares in companies, unprofitable contracts, or any other property that is unsalable or not readily salable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money.

In reference to all onerous property subject to this rule, the assignee has his election either to reject or accept it. If he elects to accept it, he cannot afterwards renounce it because it turns out to be a bad bargain. *Turner v. Richardson*, 7 East. 335. And if the property is valuable to the estate he will be guilty of a breach of duty to the estate in abandoning it. *Turner v. Richardson*, *supra*.

He has, therefore, a reasonable time within which to elect. *Graham v. Van Dieman's Land Co.*, 11 Exch. 101. But if he exercise acts of ownership, and deal with the property as though he had accepted, that will be proof of an election to accept. *Thomas v. Pemberton*, 7 Taunt. 206; see *Goodwin v. Noble*, 8 El. & B. 587; *Jones v. Hausmann*, 10 Bosw. 168; *Morton v. Pinckney*, 8 Id. 135.

The assignee, if he intends to disclaim the property, should do so with as little delay as possible, and if the property be a lease, he should, for his own protection, notify the landlord that he declines to accept the same.

§ 305. *Property fraudulently obtained by the assignor.*—When the assignor turns over to the assignee property which has been fraudulently obtained, the assignee, not being a purchaser for value, will have no higher right to the property than the assignor himself had. *Joslin v. Cowee*, 60 Barb. 48; *Chaffee v. Fort*, 2 Lans. 81. His title, therefore, is voidable at the election of the person from whom the property was originally fraudulently obtained. But before the assignee can be required to surrender the goods, he should be requested to do so upon a distinct ground, with notice of an explicit assertion of the claim that the goods were obtained by fraud. *Bliss v. Cottle*, 32 Barb. 322. While the rule would be otherwise if the assignee was a party to the fraud, yet where he has received the

goods innocently, an action cannot be maintained against him until after a demand and refusal. *Jessop v. Miller*, 2 Abb. Dec. 449; s. c. 1 Keyes, 321; *Bliss v. Cottle*, *supra*; see *King v. Fitch*, 2 Abb. Dec. 508; *Chambers v. Lewis*, 28 N. Y. 454. And when the proceeds of the goods claimed to have been fraudulently obtained by the assignor are in the hands of an insolvent assignee, and a bill has been filed by the vendee to reach the fund, the court will order the money to be paid into court to await the determination of the action. *Haggerty v. Duane*, 1 Paige, 321. But when the vendors, instead of electing to rescind the sale, affirm it by bringing an action against the fraudulent vendee to recover for goods sold and delivered, and prosecute the suit to judgment, they cannot afterwards set up the fraud for the purpose of defeating an assignment of the property made by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee. *Kennedy v. Thorp*, 51 N. Y. 174.

§ 306. *Property fraudulently transferred by assignor.*—In another connection (*ante*, § 170, and cases) will be found the provisions of the act of 1858, authorizing an assignee to disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of creditors. Under that statute the assignee has ample power, and it is his duty to attack fraudulent conveyances made by the assignor, and to recover the property fraudulently disposed of.

§ 307. *Employment of agents.*—The assignee may employ other persons to act for him when circumstances render it necessary, and when for good and sufficient reasons he is unable to give the business his personal supervision and attention. *Casey v. Janes*, 37 N. Y. 608, 612; *Mann v. Whitbeck*, 17 Barb. 388; *Van Dine v. Willett*, 38 Id. 319; and see *ante*, § 216; see *Grinnell v. Buchanan*, 1 Daly, 538.

But he cannot delegate his powers. Thus he cannot convey the assigned property to a third person to appropriate the same in the manner provided for in the assignment, because that amounts to the substitution of another trustee. *Small v. Ludlow*, 1 Hilt. 189.

The trust created by an assignment for the benefit of creditors is an active trust to be executed by the assignee himself for the advantage of such creditors. *Litchfield v. White*, 3 Sandf. 545, 551.

There is no impropriety in his employing the same clerks who were previously employed by the assignor. *Parker v. Jervis*, 3 Abb. Dec. 449. But he cannot employ clerks for an unlawful purpose, as to sell goods at retail in the usual course of business. *Carman v. Kelly*, 12 Supm. Ct. (5 Hun), 283.

§ 308. *Employing the assignor as agent.*—Although the appointment of the assignor as his agent by the assignee is a circumstance ordinarily regarded with suspicion (*Butler v. Stoddard*, 7 Paige, 163; s. c. 20 Wend. 507; *Pine v. Rikert*, 21 Barb. 469; *Adams v. Davidson*, 10 N. Y. 309); yet that circumstance alone will not afford sufficient evidence of an original intent on the part of the assignor and assignee, or either of them, to defraud creditors. *Browning v. Hart*, 6 Barb. 91; see *Hitchcock v. St. Johns*, Hoff. Ch. 511; *Nicholson v. Leavitt*, 4 Sandf. 252, 272; *Casey v. Janes*, 37 N. Y. 608; *Ogden v. Peters*, 21 N. Y. 23; *Beamish v. Conant*, 24 How. Pr. 94. And when the assignee is not acquainted with the business, and has no acquaintance with those who are indebted to the assignor, the fact that he employs the assignor as his agent, if he has confidence in his integrity, is not improper. *Wilbur v. Fradenburgh*, 52 Barb. 474.

§ 309. *Examination of debtor and other witnesses, and production of books and papers under the general assignment act.*—The general assignment act has provided a summary method by which the assignee may make himself acquainted with the circumstances of the assigned estate, and obtain an inspection and delivery of the debtor's books and papers. By the third section of the act (cited *ante*, § 273), it is provided that the books and papers of the debtor shall at all times be subject to the inspection and examination of any creditor, and the county judge is authorized, by order, to require the debtor or assignee to allow such inspection or examination, and by the twenty-first section of the same act it is provided that:

“The county judge may also at any time, on petition of any

party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him or before a referee appointed by him for such purpose, and the evidence so taken, together with books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party, as above provided, shall be excused from answering on the ground that his answer may criminate him, but such answer shall not be used against him in any criminal action or proceeding." Laws of 1877, chap. 466, § 24.

An assignor who refuses to deliver the title deeds or give necessary information of the assigned estate to the assignee, may be ordered, on application of the latter, to appear and submit to examination. *Matter of Straus*, 1 Abb. N. C. 402. An assignee should allow the creditors reasonable opportunity to examine the books of the debtor, and where he permits the debtor to remain in possession of the books, and the debtor refuses creditors access to them, this is a suspicious circumstance, and, taken in connection with other suspicious circumstances, will warrant the appointment of a receiver of the assigned property. *Manning v. Stern*, 1 Abb. N. C. 409.

Similar provisions in reference to criminating answers are made in the case of the examination of judgment debtors in supplemental proceedings. Code, § 292; *Forbes v. Willard*, 54 Barb. 520; s. c. 37 How. 193.

§ 310. *Examination of an insolvent debtor under the provisions of the Revised Statutes.*—Provisions are also made for the examination of the insolvent debtor and other witnesses under the statutory proceedings in reference to insolvent debtors set out in Parts I and II of this work, for the purpose of a discovery of property.

"Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the first section of the seventh article of this title (see *ante*, § 26), or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested

in the said trustees, or that any person can testify concerning the concealment or embezzlement thereof, or that any person who shall not have rendered an account as above required, is indebted to such a debtor, or has property in his custody or possession belonging to such debtor, such officer or judge shall issue a warrant commanding any sheriff or constable to cause such debtor, his wife, or other person to be brought before him at such time and place as he shall appoint for the purpose of being examined." 2 R. S. 43, § 12; 3 R. S. 6th ed. 38, § 14; 2 Edm. 45; 1 Fay's Dig. 389.

Under this section it is enough for the assignee who applies for the warrant to swear to the facts on information and belief. *Noble v. Halliday*, 1 N. Y. 330; s. c. 1 Barb. 148. And when the person has property of the debtor in his possession, either individually or as administrator, he may be compelled, under oath, to state what he knows in reference to such property. *Noble v. Halliday, supra*.

And it is further provided that :

"The officer issuing such warrant shall examine every person so brought before him on oath in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor, and shall reduce the examination to writing, which the person so examined is hereby required to sign, and which shall be attested by the officer." 2 R. S. 44, § 13; 3 R. S. 6th ed. 38, § 15; 2 Edm. 45; 1 Fay's Dig. 389.

"If any person so brought before such an officer shall refuse to be sworn or to answer satisfactorily all lawful questions put to him, or shall refuse to sign such an examination, not having a reasonable objection thereto to be allowed by such officer, the said officer shall, by warrant, commit to prison, there to remain without bail until he shall submit to be sworn, or to answer as required, or to sign such examination; in which warrant, the particular default of the person committed shall be specified, and if it be on not answering any question, such shall be specified therein." 2 R. S. 44, § 14; 3 R. S. 6th ed. 39, § 16; 2 Edm. 45; 1 Fay's Dig. 389.

"If any person so committed shall bring a writ of *habeas corpus*, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment. But the court or officer before whom such person shall be brought shall recommit such person unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be, or unless such a person shall then answer on oath the questions so put to him." 2 R. S. 44, § 15; 3 R. S. 6th ed. 38, § 17; 2 Edm. 45; 1 Fay's Dig. 389.

"Any sheriff or jailor willfully suffering any person so committed or recommitted pursuant to the foregoing sections, to escape, shall be liable to indictment for a misdemeanor, and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars." 2 R. S. 44, § 16; 3 R. S. 6th ed. 39, § 18; 2 Edm. 45; 1 Fay's Dig. 389.

"The person so examined and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this article for concealing and not delivering any property or paying any debt, but his answers on such examination may be given in evidence in the same manner and with like effect as if they had been made in answer to a bill in equity filed by such trustees." 2 R. S. 44, § 17; 3 R. S. 6th ed. 39, § 19; 2 Edm. 46; 1 Fay's Dig. 389.

§ 311. *Premium for discovering secreted property of insolvent debtor under Revised Statutes.*—It is also provided, in reference to insolvent debtors, under the proceedings in Parts I and II of this work, that :

"Any person who shall discover to the trustees any secreted effects, property or things in action, belonging to such a debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate on the value of the effects so discovered, to be paid by the trustees out of the estate of such debtor, but this section shall not extend to persons who have such property, effects or things in their possessions." 2 R. S. 44, § 18; 3 R. S. 6th ed. 39, § 20; 2 Edm. 46; 1 Fay's Dig. 389.

CHAPTER XXIII.

COLLECTING IN THE ESTATE. SUITS BY ASSIGNEE.

§ 312. *In general.*—It will be convenient, in the first place, to consider the rights and duties of assignees under general assignments, in reference to the subject-matter of this chapter, and afterwards to take up by themselves the statutory provisions in reference to trustees of insolvent debtors appointed under the Revised Statutes.

§ 313. *The right to sue.*—The assignee is not only clothed with the legal title to the assigned property, which gives him the standing to maintain legal proceedings in reference to it, but it is his duty, having received the property and accepted the trust, to defend his possession and preserve the property. *McQueen v. Babcock*, 41 Barb. 337. Even when he has been enjoined in a creditor's suit from intermeddling, receiving, or collecting any of the property assigned, it is still his right and duty to bring trespass against any person who disturbs his possession. *McQueen v. Babcock, supra*.

But if he neglect to take immediate possession, and the assigned goods become mingled with goods subsequently acquired by the assignor, he will be guilty of conversion if he seizes any of the property acquired after the assignment. *Price v. Murray*, 10 Bosw. 243.

It frequently becomes the duty of the assignee to bring actions for trespass where creditors, after the execution of the assignment, levy attachments or executions upon the assigned property for the purpose of testing the validity of the assignment. In such cases it is his duty to assert his title, and if he carelessly or negligently permits the property to be taken from him, he will be liable to the creditors whom he represents. *McQueen v. Babcock, supra*.

§ 314. *Duty as to collections.*—The duties of assignees are, so far as they are analogous, determined by the same rules which govern executors under similar circumstances. *Jermain v. Pattison*, 46 Barb. 9. It is not enough for an executor to apply for payment of debts due the estate through an attorney, he must follow the collection up actively through legal proceedings. *Perry on Trusts*, § 440. But he is not bound to prosecute a claim of a very doubtful character, unless those who desire him to do so will indemnify the estate against costs. *Hepburn v. Hepburn*, 2 Tuck. Sur. 74. He certainly would not be justified in wasting the estate in idle litigation.

But if, by his neglect or carelessness, the estate suffers a loss, he will be answerable for it. Thus, if he delay commencing suit until after the claim is barred by the statute of limitations. *Simpson v. Gowdy*, 19 Ind. 292; *Hayward v. Kinsey*, 12 Mod. 573; see *Williams on Ex.* 1805.

And when the assignee retains notes belonging to the estate for a number of years, without making any effort to collect them, and when called upon to account, sets up that the maker is solvent and responsible, he will be charged with the face of the notes. *Winn v. Crosby*, 52 How. Pr. 174.

§ 315. *Parties.*—The general rule is that all persons materially interested in the subject-matter of the suit ought to be made parties, and that the *cestui que trust*, as well as the trustees, should be brought before the court, so as to make the performance of the decree safe to those who are compelled to obey it, and to prevent the necessity of the defendant's litigating the same question again with other parties.

But the case of assignees, or other trustees of a fund for the benefit of creditors, who are suing for the protection of the fund, or to collect moneys due to the fund from third persons, appears to be an exception to the general rule that the *cestui que trust* must be made a party to a suit brought by a trustee. *Christie v. Herrick*, 1 Barb. Ch. 254. And, in that case, it was held that an assignee for the benefit of creditors might maintain an action in his own name to foreclose a mortgage which passed to him under the assignment.

And even before the Code, an assignee for creditors could

file a bill in his own name relative to the trust estate, without making the creditors provided for in it parties. *Wakeman v. Grover*, 4 Paige, 23; *Lewis v. Graham*, 4 Abb. Pr. 106, 108; see *Sherman v. Burnham*, 6 Barb. 403, 414. But the Code expressly provides that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. Code, § 113; Code of Civ. Pro. § 449.

The assignee may bring an action to collect a debt due the estate in his own name, or in his representative capacity. *Hoagland v. Trask*, 48 N. Y. 686; aff'g, 6 Robt. 540; *Ogden v. Prentice*, 33 Barb. 160. But in order to secure that he be not personally chargeable with costs in case of defeat, it is wiser for him to sue as assignee. Code, § 371.

If there are several assignees, they must all join in bringing suit. This is on the principle that joint assignees constitute in law but one person. *Brinckerhoff v. Wemple*, 1 Wend. 470; *Thatcher v. Candee*, 4 Abb. Dec. 387; s. c. 3 Keyes, 157. But only those who accept need join. *Van Valkenburgh v. Elmen-dorf*, 13 Johns. 314.

And, for the same reason, if one of the assignees dies, the action continues in the name of the survivors.

When all the assignees die, the property, if it be personal estates, passes under the common law to his personal representatives; and if the cause of action survive, it vests in them. *Emerson v. Bleakley*, 5 Abb. N. S. 350; *Bunn v. Vaughan*, Id. 269; s. c. 1 Abb. Dec. 253; 3 Keyes, 345.

Otherwise of the real estate the trusts in which devolve upon the Supreme Court to be administered by a trustee to be appointed by the court. 1 R. S. 730, § 68. See *Savage v. Burnham*, 17 N. Y. 561; *Kane v. Gótt*, 24 Wend. 641; *Bunn v. Vaughan*, *supra*.

But in *Curtis v. Smith* (60 Barb. 9), it was held that the provision of the statute was applicable to trusts of personal as well as real property. *Emerson v. Bleakley* (*supra*), is not a strong authority to the contrary, for the reason that in that case the substituted assignee was permitted to maintain the suit, it having been shown that the defendant's had consented to his appointment, and it seems that if the title to the personal property does pass to the personal representative, it is still the duty

of the creditors to see that an active trustee is appointed. *Bowman v. Rainetaux*, Hoff. 150.

Where a suit has been commenced by the insolvent before the assignment of his estate, the action may be continued in the insolvent's name for the benefit of the assignees, or the court may direct the assignee to be substituted in the action. Code of Civ. Pro. § 756; *Raymond v. Johnson*, 11 Johns. 488; *Sedgwick v. Cleveland*, 7 Paige, 287; see *Getly v. Spaulding*, 58 N. Y. 636; *Glenville Woolen Co. v. Ripley*, 11 Abb. N. S. 87.

But if a claim which passes under the assignment is prosecuted to judgment in the name of the assignor, the title to the judgment is in the assignee, and the judgment will not vest in a receiver of the assignor's property, although the assignee had died between the recovery of the judgment and the appointment of a receiver. *Merritt v. Sawyer*, 6 Supm. Ct. (T. & C.), 160.

Where a debt is due to two persons jointly, and one of them is decreed to be a bankrupt, or where one of them makes an assignment under the insolvent acts, the action for the recovery of the debt, in a court of law, must be brought in the names of the other creditors and of the assignees jointly, and neither can sue in his own name alone. *Ontario Bank v. Mumford*, 2 Barb. Ch. 596. *Willinck v. Renwick*, 23 Wend. 63.

If one of the assignees receive and retain a portion of the estate, and if he convert it to his own use, his co-assignee cannot maintain an action against him or his personal representatives to recover the property, or for its conversion. The only remedy in such a case for the assignee is to bring an action to restrain and remove his unfaithful associate, but the property can be reached only by a bill filed by the creditors to compel an accounting. *Bartlett v. Hatch*, 17 Abb. Pr. 461.

But in all actions in reference to the trust estate the trustees are necessary parties. *Moran v. Hays*, 1 Johns. Ch. 339; *Sells v. Hubbell*, 2 Johns. Ch. 394. And wherever the suit is to take the trust fund out of the hands of the trustees, or where it is for an account of the trust fund, being in fact a bill for the execution of the trust, the *cestui que trust* must all be parties. *Sherman v. Burnham*, 6 Barb. 414.

As a general rule a trustee cannot institute proceedings in equity relating to the trust property without making the whole of the *cestui que trust* parties. *Hill on Trustees*, 542; *Malin v. Malin*, 2 Johns. Ch. 238; *Fish v. Howland*, 1 Paige, 20; *Schenck v. Ellingwood*, 3 Edw. Ch. 175; *Whelan v. Whelan*, 3 Cow. 537.

But under the Code, they may, when numerous, be made parties constructively, under §§ 448, 786, which will be considered more particularly under the head of accounting.

§ 316. *Defences*.—As we have already had occasion to remark, the assignee takes the property and estate of the debtor subject to all equities against it in the hands of the assignor. Any defence, therefore, which would be available against the assignor is equally available against the assignee.

A person indebted to the estate cannot avail himself of a defence that the assignment is fraudulent and void as against creditors, if the assignment is sufficient to pass the title between the assignor and assignee. *Sheridan v. Mayor*, 68 N. Y. 30; *Allen v. Brown*, 44 N. Y. 228; *Stone v. Frost*, 61 N. Y. 614; *Richardson v. Mead*, 27 Barb. 178. But when the assignment is absolutely void, and not voidable merely so that no title passes under it, the rule is otherwise.

Where the assignee of an insolvent firm brought an action to recover moneys due the firm, and the complaint alleged the assignment of the firm to the plaintiff, the execution of which the defendants admitted on the trial, it was held that defendants could not afterwards object to the assignment on the ground that it was not executed by all the partners. The objection should, have been made on the trial, because the want of signature of one of the defendants might have been remedied by proof of his assent to the signature of the firm. *Colwell v. Lawrence*, 38 Barb. 643. Where the assignee sued an accommodation indorser upon a promissory note made by the assignor, and which had been transferred to the assignee individually, before the assignment, in payment of goods sold, it was held that the indorser could not in that action ask to have the *pro rata* share due under the assignment, applied in payment upon the note, for the reason that the amount due was

unascertained, and could not be ascertained except in an action for an accounting, which could not be had in that action. *Bailey v. Bergen*, 67 N. Y. 346; rev'g s. c. 9 Supm. Ct. (2 Hun), 520. It was said that, if the accounts of the plaintiff, as assignee, had been settled, and he had in his hands an admitted or established balance, it might be that, in order to avoid circuity of action, he could be compelled to make the application.

§ 317. *Evidence; Declarations of assignor.*—Declarations made by a person under whom a party claims after the declarant has parted with his right, are inadmissible to affect any one claiming under him. 1 Phillip on Ev. 314, 322; *Foster v. Beals*, 21 N. Y. 247, 249; *Paige v. Cagwin*, 7 Hill, 361; *Peck v. Crouse*, 46 Barb. 151. The acts and declarations of the assignor have in some instances been admitted as binding upon the assignee. (See *ante*, § 230.) Declarations made at the time of executing the assignment are thus admissible as part of the *res gestæ*, and it has been held that the declarations of the assignor while he was in possession of the assigned property were competent evidence. *Adams v. Davidson*, 10 N. Y. 309, 313; see this case criticised in *Cuyler v. McCartney*, 40 N. Y. 221, 235.

It has been thought that the admissions of the assignor after the assignment were admissible on the theory that the assignee is the representative and agent of the assignor. This doctrine, however, is not sustained by principle or authority. There is no identity of interest between an insolvent assignor and his assignee. The latter holds primarily for the creditors and for those in hostility to the assignor. He does not represent merely or primarily the assignor, nor hold chiefly for his interest and benefit, but rather for the creditors of the assignor, and is accountable in the first place to them. *Bullis v. Montgomery*, 50 N. Y. 352, 358, 359; *Cuyler v. McCartney*, 40 N. Y. 221, 235. In order to make the declarations of the assignor after the assignment competent evidence, it must be shown that the assignor and assignee are combined in a common conspiracy to defraud the assignor's creditors. *Cuyler v. McCartney*, 45 N. Y. 221; *Newlin v. Lyon*, 49 N. Y. 661. And this common purpose must be established by evidence other than the declarations themselves. *Cuyler v. McCartney*, *supra*.

§ 318. *Set-off*.—The assignee takes the debt assigned to him subject to the right of set-off which the debtor had against it at the time of the assignment. If, therefore, at the time of the assignment the debtor had a valid *present* claim against the assignor, he may use the claim as a set-off in any action brought by the assignee. *Martin v. Kunzmuller*, 37 N. Y. 396; *Myers v. Davis*, 22 N. Y. 489; *Hicks v. McGrorty*, 2 Duer, 295; *Thompson v. Hooker*, 4 N. Y. Leg. Obs. 17; *Williams v. Brown*, 2 Keyes, 486; *Crosbie v. Leary*, 6 Bosw. 312; *Wells v. Stewart*, 3 Barb. 40; *Chance v. Isaacs*, 5 Paige, 592; *Mason v. Knowlson*, 1 Hill, 218; *Ogden v. Cowley*, 2 Johns. 274; *Keep v. Lord*, 2 Duer, 78; *Beckwith v. Union Bank*, 9 N. Y. 211; aff'g 4 Sandf. 604; *Lawrence v. Bank of Republic*, 35 N. Y. 320.

In the case of *Martin v. Kunzmuller* (37 N. Y. 396; aff'g 10 Bosw. 16), where at the time of the assignment the defendants were indebted to the assignors for goods sold, and held three promissory notes of the assignors, two of which had matured at the time of the assignment, the other being not yet due, in an action brought by the assignor upon the claim for goods sold it was held that the defendants might offset the notes which had matured at the date of the assignment, but not the other note.

The inquiry always is, whether, if at the date of the assignment the assignor had brought suit against the defendant, he would then have had an available set-off. Following this principle, if the claim held by the assignor's debtor is not due at the date of the assignment, he cannot offset it against the claim of the assignee. *Bradley v. Angel*, 3 N. Y. 475; *Martine v. Willis*, 2 E. D. Smith, 524; *Myers v. Davis*, 22 N. Y. 489; *Hicks v. McGrorty*, 2 Duer, 295; *Fort v. McCully*, 59 Barb. 87; *Keep v. Lord*, 2 Duer, 78. The case of *Maas v. Goodwin* (2 Hilt. 275), must be regarded as overruled in the later cases.

Hence, also, a claim against the assignor acquired, by purchase or otherwise, after the assignment, is not available as an offset against a claim due to the assignor in the hands of the assignee. *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Mason v. Knowlson*, 1 Hill, 218; *Crosbie v. Leary*, 6 Bosw. 312; *Myer v. Davis*, 22 N. Y. 489; *Smith v. Brinckerhoff*, 6 N. Y. 305.

But when the claim in favor of the estate of the assignor

is not due at the time of the assignment, but the claim against the estate is due, an equitable set-off in favor of the assignor's debtor, will be allowed. *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Lindsay v. Jackson*, 2 Paige, 581; *Barber v. Spencer*, 11 Paige, 517; *Ainslie v. Boynton*, 2 Barb. 258; *Mel v. Holbrook*, 4 Edw. Ch. 538.

In the case of *Smith v. Felton* (*supra*), where an action was brought by the assignee, in trust for creditors of an insolvent banker, on a note held by the banker made by one of the defendants, who were partners, and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment, it was held that the amount of the deposit of the defendants with the banker was a proper subject of set-off. And this case was followed and approved in *Smith v. Fox*, 48 N. Y. 674.

In the case of *Schieffelin v. Hawkins* (14 Abb. Pr. 112), where neither claim was due at the date of the assignment, the assignor's debtor was permitted to maintain an action for an equitable set-off after his claim matured.

The holders of the bills of an insolvent bank may set them off against a claim by the receiver of the bank, but not if the bills were obtained after the bank stopped payment though before a receiver was appointed. *In re Receiver of Middle Dist. Bank*, 9 Cow. 409, note; see 1 Paige, 585; see *McLaren v. Pennington*, 1 Paige, 102.

In the case of *Lawrence v. Bank of New York* (35 N. Y. 320), the plaintiffs, as assignees, sued the defendant to recover a debt due them for certain moneys deposited to their credit. The defendants undertook to set up a claim to the fund on the ground of an attachment obtained by them against the property of the assignors on the ground that the assignment was fraudulent, it was held that they acquired no lien upon the funds by the institution of their action, and had no equitable set-off or counter-claim.

In *Beckwith v. The Union Bank* (9 N. Y. 211; *aff'd* 4 Sandf. 604), where an insolvent firm, having money deposited in bank, made a general assignment of their property for the benefit of their creditors, soon after, but before the bank had notice of the assignment, a bill against the firm, held by the

bank, greater in amount than the sum on deposit, fell due, it was held that the assignee, after demand of the sum on deposit, was entitled to recover it of the bank, and that his right was complete without giving notice of the assignment, where the bank, by its subsequent acts, had not affected his rights.

Held, also, that the bank could not, as against the assignee, apply the deposit in payment of the bill. *Beckwith v. The Union Bank of New York*, 9 N. Y. 211; *aff'g* 4 Sandf. 604.

Where a corporation, after its insolvency, pays dividends to its stockholders, such stockholders are liable for the amounts thus received to the creditors of the corporation or to a receiver of it. And in an action by the receiver against one of the stockholders for the amount paid to him as a dividend by the insolvent company, he cannot offset against the receiver in such action any claims which he holds against the company, for the reason that the receiver represents not the company, but the creditors who are parties beneficially interested. The case is, therefore, not brought within the statute in relation to set-offs, nor within the spirit of the decisions relating to set-offs. *Osgood v. Ogden*, 4 Keyes, 70.

It is not necessary that the assignees should give a judgment creditor of the assignor notice of the assignment to them, in order to prevent such creditor from using his judgment, obtained after the assignment against the assignor, as a set-off or other defense in an action by the assignee against his judgment creditor. The lack of notice is not material where the defendant does not do any act, subsequent to the assignment, which he would not have done if he had received notice. *Ogden v. Prentice*, 33 Barb. 160.

A judgment obtained against the assignor subsequent to the assignment, cannot be set off against a claim of the assignee, although the assignment was made without notice to the judgment creditor. *Ogden v. Prentice*, 33 Barb. 160. And judgments purchased after the assignment cannot be set off. *Spencer v. Barber*, 5 Hill, 568; *Graves v. Woodbury*, 4 Id. 559; see *Roberts v. Carter*, 38 N. Y. 107; *rev'g* 24 How. Pr. 44.

In an action brought by a creditor to compel an accounting, the assignee cannot set up expenditures made by him by way

of counter-claim and insist upon their allowance because no reply was interposed. *Duffy v. Duncan*, 35 N. Y. 187, 189.

Where a general assignment provided that the assignee should use and apply the fund in the same order and manner in which the estate of a bankrupt is required to be used and applied for and towards the payment of the debts of such bankrupt proved and allowed under the bankrupt act, it was held that this applied to a case of set-off, and that, under the provisions of the bankrupt act, the debtor might set off a debt provable in bankruptcy, though not due at the time of the assignment. *Fort v. McCully*, 59 Barb. 87; see *post*, § 323.

§ 319. *Compromise of debts due the estate.*—The general assignment act of 1877 provides that “the county judge of the county where the assignment is recorded may, upon the application of the assignee and for good cause shown, and on such terms as he may direct, authorize the assignee to compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing, upon the final accounting of such assignee, that such debt or claim was fraudulently or negligently compounded or compromised. And the assignee shall be charged with, and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him.”

Previous to this enactment the county court had no power to direct the assignee in the general administration of his trust. That power resides only in a court of equity. *Shipman's Petition*, 1 Abb. N. C. 406; see *ante*, § 294.

This section extends the power of the court only in the instance named. *Matter of Lewis*, Daily Reg. Aug. 1878. When the assignee made application under this section by petition setting forth that a large portion of the assets of the assignor's estate consisted of claims against persons in the Southern States, that these claims were about 460 in number and of various amounts, from \$2 to \$2,150, and that sixty of them could not be collected, as the assignors believed, for the reason, among others, that they were in suspense; and that the assignee had learned, by long experience, that delay in settling such debts—

especially in the Southern States—usually ends in loss, and asking for an order authorizing him to compromise, in his discretion and upon the best terms that he could obtain, all claims due to the assignors, and to receive in settlement thereof cash, notes, securities, and such available assets as he may deem best, it was held that there was no authority for an order of the court conferring such general powers; that the circumstances of the particular case are to be laid before the judge, and that he, and not the assignee, is to determine whether the debt should be compromised, and upon what terms. *In re Ransom*, Daily Reg. June 13, 1878, Daly, C. J.

Independent of the statute the assignees have the authority, though not expressly given them in the assignment, to compromise or compound such debts as cannot be wholly collected, provided they act in good faith and do that which is best for the creditors under the circumstances. *Anon. v. Gelpcke*, 12 Supm. Ct. (5 Hun), 245, 254, Daniels, J. A contrary opinion is expressed by Daly, C. J., in *In re Ransom*, *supra*; and see cases cited *ante*, § 214.

The statute makes no provision for notice to creditors of the application. It expressly reserves to the creditors the right to show that the debt or claim was fraudulently or negligently compounded or compromised, and the assignee is made liable for any sum which might or ought to have been collected by him. The result of the statute, therefore, is, that when notice is not given to the creditors, so as to bind them by the order of the court, the order obtained only shifts the burden of proof upon an accounting, and throws upon the creditors the necessity of showing that the claim might or ought to have been collected by the assignee. As to the requirement of notice to protect the assignee, see *ante*, § ~~202~~ 294

§ 320. *Costs*.—The Code provides (§ 317), that in an action prosecuted or defended by the trustee of an express trust costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon, or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad

faith in such action or defense. It has been held that a general assignee for the benefit of creditors is a trustee of an express trust within this section. *Cunningham v. McGregor*, 12 How. Pr. 305 ; s. c. 5 Duer, 648 ; see also *Cutler v. Reilly*, 5 Robt. 637.

It is also provided by statute, "that any indorser or other surety, and any assignee, executor, administrator, or other trustee, shall be entitled to and allowed to recover from his principal or *cestui que trust* all necessary and reasonable costs and expenses paid by him in good faith as surety or trustee in the prosecution or defence in good faith of any action by or against any assignee, executor, administrator, or other trustee, as such." Laws of 1858, chap. 314, § 3 ; 3 R. S. 6th ed. 146, § 3.

§ 321. *Security for costs.*—The Revised Statutes provide, "that when a suit shall be commenced in any court for or in the name of the trustees of any debtor, or for or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment, pursuant to law, for the collection of any debt contracted before the assignment of his estate, the defendant may require the plaintiff to file security for costs." 2 R. S. 620, § 1 ; 3 R. S. 6th ed. 900, § 1.

This provision does not apply to an assignee under a general assignment for the benefit of creditors, but simply to trustees of insolvent debtors appointed under the Revised Statutes. *Ferriss v. Am. Ins. Co.* 22 Wend. 586 ; see *Ranney v. Stringer*, 4 Bosw. 663.

Where an action was commenced by a person who had been exonerated from arrest under the statute more than ten years before, it was held that the defendant must furnish other proof of the plaintiff's inability to pay costs before security would be required. *Gomez v. Garr*, 18 Wend. 577.

§ 322. *Trustees of insolvent debtors appointed under Revised Statutes ; Reference as to disputed claims.*—The Revised Statutes provide a special method for the settlement of controversies as to claims in favor of or against the estate of an

insolvent debtor, under the statutory proceedings considered in Parts I and II of this work.

It is enacted that: "If any controversy shall arise between the trustees and any other person in the settlement of any demands against such a debtor, or of debts due to his estate, the same may be referred to one or more indifferent persons, who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect signed by them." 2 R. S. 45, § 19; 3 R. S. 6th ed. 39, § 21; as amended by Laws of 1862, ch. 373; 2 Edm. 46; 1 Fay's Dig. 389.

"If such referee or referees be not selected by agreement, then the trustees or the other party to the controversy may serve a notice of their intention to apply to the officer who appointed said trustees, or to any judge of the Supreme Court at chambers, residing in the same district with the trustees, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified." 2 R. S. 45, § 20; 3 R. S. 6th ed. 39, § 22; 2 Edm. 46; 1 Fay's Dig. 389.

"On the day so specified, upon due proof of the service of such notice, the officer before whom the application is made shall proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the Supreme Court." 2 R. S. 45, § 21; 3 R. S. 6th ed. 39, § 23, as amended by Laws of 1862, ch. 373; 2 Edm. 46; 1 Fay's Dig. 390.

"When any witness to such controversy shall reside out of the county where the said trustees resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have the power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to the said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace." 2 R. S. 45, § 22; 3 R. S. 6th ed. 39, § 24, as amended by Laws of 1862, ch. 373; 2 Edm. 46; 1 Fay's Dig. 390. As to the manner of taking

commission, see Laws of 1838, ch. 243, § 2; Laws of 1847, ch. 329.

“The officer before whom they shall be selected shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the trustees in the office of a clerk of the Supreme Court where the trustees were appointed, under the first article of this title, and in the said office or in that of the clerk of the Court of Common Pleas of the county where the trustees were appointed, under any other article of this title, and a rule shall thereupon be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.” 2 R. S. 45, § 23; 3 R. S. 6th ed. 39, § 25; 2 Edm. 47; 1 Fay’s Dig. 390.

“Such referees shall have the same powers and be subject to the like duties and obligations, and shall receive the same compensation as referees appointed by the Supreme Court in personal action pending therein.” 2 R. S. 45, § 24; 3 R. S. 6th ed. 40, § 26; 2 Edm. 47; 1 Fay’s Dig. 380.

“The report of the referees shall be filed in the same office where the rule for their appointment was entered, and shall be conclusive on the rights of the parties if not set aside by the court.” 2 R. S. 45, § 25; 3 R. S. 6th ed. 40, § 27; 2 Edm. 47; 1 Fay’s Dig. 390.

The debtor may compel the trustees by mandamus to appoint referees to contest the validity of the debts presented and claimed against him. *Titus v. Kent*, 1 How. Pr. 80; *Matter of Belknap*, 2 Id. 200.

The reference is only authorized by the statute when a controversy shall arise on the settlement of any demands against the debtor, or of debts due his estate. And, accordingly, where the trustees of non-resident debtors claimed that certain shares of the capital stock of a foreign bank, which were standing upon the books of the agent of the bank in this State, in the names of the debtors, and which had been assigned with the consent of the trustees to third persons, and by the latter to the trustees, should be transferred to them by the agent; and this was refused by the agent, and the trustees thereupon procured the appointment of referees to settle the controversy; and on the hearing before the referees it was objected that the referees

had no jurisdiction to determine the matter in dispute, and the referees reported in favor of the trustees, subject to the opinion of the court. It was held that the referees had no jurisdiction of the case, the matter in controversy not being a *debt* within the meaning of the statute; and the report of the referees was set aside. *Matter of Denny*, 2 Hill, 220.

The referee, when requested, must report the findings of fact and conclusions of law separately. *Matter of Harmony Fire & M. Ins. Co.* 14 Abb. Pr. N. S. 292, note.

The question of the constitutionality of this provision for a compulsory reference was raised but not determined, in *Austin v. Rawdon*, 42 N. Y. 155; rev'g *Matter of Austin*, 44 Barb. 434.

There is no express provision of the statute authorizing the entry of judgment upon the report of the referees. But the declaration that the report shall be "conclusive on the rights of the parties if not set aside by the court," is equivalent to a judgment, and the entry of a judgment upon the report is the proper practice. *Austin v. Rawdon*, *supra*.

§ 323. *Set-off in case of assignees of insolvent debtors appointed under the Revised Statutes.*—The following are the provisions of the Revised Statutes in reference to set-off in the case of insolvent debtors.

"Where mutual credit has been given by any debtor (except a debtor proceeding under the sixth article of this title),¹ and any other person, or mutual debts have subsisted between such debtor and any other person, the trustees may set off such credits or debts, and pay the proportion or receive the balance due; but no set-off shall be allowed of any claim or debt which would not have been entitled to a dividend, as hereinbefore directed." 2 R. S. 47, § 36; 3 R. S. 6th ed. 41, § 41; 2 Edm. 49; Fay's Dig. 391.

"No set-off shall be allowed by such trustees of any claim or debt which shall have been purchased by or transferred to the person claiming its allowance, which could not have been set off by him, according to the provisions of this article, in a

¹ *Ante*, chap. VII.

suit brought by such trustees." 2 R. S. 47, § 37; 3 R. S. 6th ed. 41, § 42; 2 Edm. 49; 1 Fay's Dig. 391; and see paragraph 9 section 9, cited *ante*, § 291; and see similar provision of bankrupt law. R. S. U. S. § 5073.

The rules applicable to set-off in the case of assignees of insolvent debtors under the statutory proceedings are therefore different from those which prevail in reference to set-off by assignees under a general assignment. The statute provides for the set-off of "mutual credits" as well as "mutual debts," under which it has been held that claims not yet matured and not liquidated, although capable of liquidation, are within the statute. *Osgood v. DeGroot*, 36 N. Y. 348; *Nelson v. Edwards*, 40 Barb. 279; *Pardo v. Osgood*, 5 Robt. 48; *Berry v. Brett*, 6 Bosw. 627.

The receivers of insolvent insurance companies are vested by statute with all the powers and authorities conferred by law upon the trustees of insolvent debtors (2 R. S. 469, §§ 68-74), and several cases have arisen in which the statute has been applied to such receivers. Thus, after a general average loss under a marine insurance policy, and while the loss was unliquidated, the company became bankrupt. The receivers held a liquidated claim against the insured on his premium note, which matured earlier than the claim against the company, and which they proceeded to enforce. *Held*, that as the two claims arose out of the same transaction, the insured was entitled to have the loss set off against his obligation to the company. *Osgood v. DeGroot*, 36 N. Y. 348; see *Nelson v. Edwards*, 40 Barb. 279; *Pardo v. Osgood*, 5 Robt. 348; *In re Globe Ins. Co.* 2 Edw. Ch. 625.

So, in the case of a receiver of a bank vested with the same powers as trustees of insolvent debtors. Where at the time of the failure of a bank, the bank was indebted to a certain creditor in a given sum, and the same creditor owed the bank a smaller sum upon a note not then due, this was regarded as a case of mutual credit. *Jones v. Robinson*, 26 Barb. 310; *Holbrook v. The Receivers of the Am. Fire Ins. Co.* 6 Paige, 220.

§ 324. *Compromise of claims by assignee of insolvent debtor appointed under Revised Statutes.*—The trustees of an

insolvent debtor (see *ante*, § 291), are empowered under the order of the officer appointing them, to compound with any person indebted to the debtor, and to discharge all demands against such person. In such case the judicial officer must have all the facts of the particular case before him, before he can make an order that the debt may be compounded and the debtor discharged, for there is no authority to make a general order that the assignee may compound any claims against the estate which in his discretion he may think proper. *In re Ransom*, Daily Reg. June 13th, 1878, Daly, C. J.

CHAPTER XXIV.

SALE OF THE ASSIGNED PROPERTY.

§ 325. *Power of sale.*—An assignment in trust to pay debts necessarily implies a power of sale, though none is given in words. Perry on Trusts, § 766 ; Hill on Trustees, 4th Am. ed. 471 ; see *ante*, § 159.

A power of sale can be exercised only in the mode and subject to the qualifications prescribed by the instrument creating the power. The assignor, being the absolute owner of the property, and in no manner obliged to assign, may annex such conditions and qualifications to the transfer as he pleases. If he annex an improper condition the court may pronounce the assignment itself void. It cannot hold the transfer good and disregard the condition. *Jessup v. Hulse*, 21 N. Y. 168, 170.

Whatever discretion or authority the assignment confers, the assignee may not only exercise, but he becomes bound by the acceptance of the trust to exercise. See *Mason v. Martin*, 4 Md. 125.

A trust to sell will not authorize the trustee to mortgage. *Bloomer v. Waldron*, 3 Hill, 361 ; *Waldron v. McComb*, 1 Hill, 111 ; *Russell v. Russell*, 36 N. Y. 581 ; *Albany Ins. Co. v. Bay*, 4 N. Y. 9 ; *Coutant v. Lecross*, 3 Barb. 133.

§ 326. *Duty in regard to sale.*—The assignee is bound to regard the interests of the creditors in the management of the affairs of his office, and as to the manner of sale. Lord Eldon laid down the rule that a trustee should bring the estate to the hammer under every possible advantage to his *cestuis que trust*. *Downes v. Grazebrook*, 3 Mer. 208 ; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 110 ; *Franklin v. Osgood*, 14 Johns. 527.

If the trustees sell under circumstances of haste or improvidence, or if they contrive to advance the interests of one party to the expense of another, they will be personally responsible

to the injured party for the loss. *Osgood v. Franklin*, 2 Johns. Ch. 27; 14 Johns. 527; *Quackenbush v. Leonard*, 9 Paige, 347.

“As the agent or officer of the law, the assignee is necessarily invested with some discretionary power. He cannot sell instanter, but is bound to exercise reasonable care and prudence in regard to the time and circumstances of the sale. He may take time to advertise, and must, therefore, select the day when the sale is to take place. If no bidders should attend upon the day appointed, he would have power, and it would be his duty, to postpone the sale to another day. He would be obliged, also, to determine whether the property should be sold in separate parcels, or all in one parcel, and to exercise in that and other similar respects some discretion as to the manner and circumstances of the sale.” Selden, J., in *Jessup v. Hulse*, 21 N. Y. 168.

It is the duty of the assignee to be present at the sale and control it, and if the sale is so conducted as to prevent fair competition, whether cognizant of the circumstances or not, he is bound to make good the loss, and should be charged in the settlement of his accounts with the fair value of the property sold, and interest upon it, just as if the money had been received. *Harvey's Admr. v. Steptoe's Admr.* 17 Gratt. 289. A trustee who sells at an improper time, or without conforming to the conditions of his power, will be liable for a deficiency of the proceeds of sale, though his intentions were good. He will be held responsible for the highest value the property can be shown to have had, and be decreed to account for the difference. *Melick v. Voorhies*, 24 N. J. Eq. 305.

A trustee who takes no active part in the sale is equally responsible, for he cannot delegate his powers to a co-trustee. *Berger v. Duff*, 4 Johns. Ch. 368.

Mere inadequacy of price, unless it is so gross as to be evidence of fraud, is not sufficient to invalidate a sale, if the transaction is in good faith and due diligence was used in getting the best possible price for the property. Perry on Trusts, § 770.

§ 327. *Time of sale.*—Assignees are bound to convert the assigned property into money, and distribute it among the cred-

itors without any unreasonable delay. *Hart v. Crane*, 7 Paige, 37; *Meachem v. Stearns*, 9 Paige, 406; see *ante*, § 209.

And it is made the duty of trustees of insolvent debtors, appointed under the Revised Statutes, to convert the estate, real and personal, of the debtor into money as soon as possible. 2 R. S. 45, § 26; 3 R. S. 6th ed. 40, § 28.

If the assignee should unnecessarily retain the property unsold, and incur expense in its custody, or the property should depreciate by the delay, he would undoubtedly be responsible for all loss occasioned to the estate thereby.

§ 328. *Sales on credit*.—An authority in an assignment to the assignee to sell on credit will invalidate the instrument (*ante*, § 211), and that which the assignment may not lawfully provide and direct in express terms, can find no justification under any implied authority derivable under it. *Levy's Accounting*, 1 Abb. N. C. 177, 181, Robinson, J. Hence an assignee for the benefit of creditors is not allowed to sell on credit in this State, without obtaining leave from the court on application with notice to the creditors, or without obtaining their consent. *Burdick v. Post*, 12 Barb. 184; and see cases cited *ante*, § 211.

So in reference to an administrator, if he sell the estate of his intestate on credit and without security, he will be charged with the whole amount of the purchase-money, on the ground that he was guilty of negligence in parting with the estate without payment or security. *Hasbrouck v. Hasbrouck*, 27 N. Y. 182; *King v. King*, 3 Johns. Ch. 352; *Orcutt v. Orms*, 3 Paige, 964.

Trustees for sale must conform to their powers. If they are authorized by the power to sell on credit, they may sell upon such credit as they are authorized to give; but if the power is silent on the subject of credit, they cannot sell upon a credit. *Waldron v. McComb*, 1 Hill, 111; 7 Hill, 335; *Ives v. Davenport*, 3 Hill, 373.

§ 329. *Sales at retail; Continuing the assignor's business*.—As has been already stated, an express provision in an assignment authorizing the assignee to continue the assignor's business,

will invalidate the assignment (*ante*, § 205). *Dunham v. Waterman*, 17 N. Y. 9; rev'g 3 Duer, 166; *Renton v. Kelly*, 49 Barb. 536.

In the absence, therefore, of an express permission to the assignee on the part of all those interested in the estate, it is a breach of trust on the part of the assignees to delay the sale of the property for the purpose of retailing it out for higher prices. *Hart v. Crane*, 7 Paige, 37; *Hart v. Gedney*, 1 Am. L. Rep. 69. And in a number of cases already referred to, the circumstance that the assignee permitted the assignor, nominally as his agent, to continue the business and dispose of the goods at retail, was regarded as a marked evidence of fraud. See *Browning v. Hart*, 6 Barb. 91; *Shepherd v. Hill*, 6 Lans. 387; *Pine v. Rickert*, 21 Barb. 469; *Waverly Bank v. Halsey*, 57 Barb. 249; *Butler v. Stoddard*, 7 Paige, 163; aff'd 20 Wend. 507; *Adams v. Davidson*, 10 N. Y. 309. See *ante*, §§ 230, 231.

The rule of law in reference to sales of the assigned property at retail is very fully stated by Mr. Justice Robinson, in *Levy's Accounting* (1 Abb. N. C. 177, 185). He says:

“The idea that a general assignee for the benefit of creditors can, in the exercise of any proper discretion imposed upon him by virtue of an assignment, proceed to conduct and carry on the previous business of the assignor, so long as he pleases to do so, or to do any act in respect thereto, except such as tends to the most speedy conversion of the assigned estate into cash, is wholly untenable. * * * Attempts to convert it into cash by carrying on the business of the assignor at retail, involve the responsibility that it should thereby (after deducting all expenses) realize at least as much as if immediately sold by the assignor by private or public sale; and that no injury occurred to the creditors from any delay. While the judicious efforts of an assignee for the benefit of creditors to carry on the business of the assignor, or to convert the assigned property into cash through deferred credits, by manufacturing of raw materials, or altering goods into such other kinds of property as might prove more available, might be regarded as more advantageous than by peremptory sale, and be held as morally commendable. Such efforts and experiments

are at the risk of the assignee and his sureties, so far as they prove unprofitable and are not assented to by the creditors; and they are legally unjustifiable as against the non-concurring creditors." *Levy's Accounting*, 1 Abb. N. C. 177, 186, 187.

The investment of any of the proceeds of the assigned property in new stock for the purposes of keeping up the business, would be a direct violation of the duties of the trustee in the care of the trust property, and would render him liable for any loss, and probably for interest on the money so invested. See *ante*, § 302, and *Connah v. Sedgwick*, 1 Barb. 210; *Meachem v. Sternes*, 9 Paige, 398.

For the same reason the assignee has no right to make use of the assigned property for the purposes of making a profit out of it. Thus, where the assignee owned individually one-fourth of a steamboat, and the other three-fourths belonged to the assigned estate, and the assignee made repairs on the boat, and defended suits brought against her, and ran her on joint account, and she was finally lost by fire, it was held that, although as owner of one-fourth he had a right to run the boat, yet he neglected his duty in not selling the interest of the estate in her for the best price he could obtain, before any repairs or expenditures for running expenses were made. The court allowed the assignee three-fourths of the expense of defending the suits against the vessel, but nothing for the expense for repairs and running the vessel. *Duffy v. Duncan*, 35 N. Y. 187.

So an assignee for the benefit of creditors has no right to employ clerks to sell a stock of goods assigned to him at retail, in the usual course of business. *Carman v. Kelly*, 12 Supm. Ct. (5 Hun), 283.

§ 330. *Sales at auction.*—The assignee has in general a discretion to sell at public or private sale, as may appear to be most for the interest of creditors. *Halstead v. Gordon*, 34 Barb. 422. See *ante*, § 210. But if he cannot make an early and advantageous disposition of the property at private sale, it is his duty to bring the property to sale at auction, upon proper notice. *Hart v. Crane*, 7 Paige, 37, 38. A provision in the assignment restricting him to a sale at auction was regarded as a suspicious circumstance, in *Work v. Ellis* (50 Barb. 515).

§ 331. *Notice of sale.*—When the assignee cannot make an advantageous sale of the property at private sale, his proper course is to sell it at auction, giving the creditors reasonable notice of such sale, so that they may attend and see that it is not sold below its cash value. *Hart v. Crane*, 7 Paige, 37, 38. In addition to the notice to creditors, the assignee must give such public notice of the time and place of sale, and of the quantity and character of the property to be sold, as the assignment may prescribe; or, in the absence of any direction in the assignment, as will be most likely, in his judgment, to attract bidders. *McDermot v. Lorillard*, 1 Edw. Ch. 273. If he sell without public notice, and without disclosing the nature of the debtor's interest and for an inadequate price, the assignee will be personally liable for the loss resulting to the creditors. *Hays v. Doane*, 11 N. J. Eq. 84. What will be a reasonable and proper notice in any particular case, unless the assignment directs otherwise, must be determined by the assignee in the exercise of a proper discretion. Trustees of insolvent debtors under the Revised Statutes (*ante*, § 291) are required to give at least fourteen days' public notice of the time and place of sale, and also to publish the notice for two weeks in a newspaper printed in the county where the sale is made, if there be one.

§ 332. *Disability of assignee to purchase.*—"The general principle of equity," says Vice-chancellor Sandford, in *Dickinson v. Codwise* (1 Sandf. Ch. 214, 226), "which prohibits a purchase by parties placed in a situation of trust or confidence with respect to the subject of the purchase, has been steadily and uniformly enforced, from the time of Lord Keeper Bridgman, in 1670 (*Holt v. Holt*, 1 Chan. Cas. 190), to the present day."

This question was examined and all the authorities collated by Chancellor Kent in the case of *Davoue v. Fanning* (2 Johns. Ch. 252), and the rule determined by that case, which has since continued the uniform rule in this State, is that, if a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trust* are entitled as of course to have the purchase set aside and the property re-exposed to sale under the direction of the court. A large number of cases may be referred to as sustaining this general doc-

trine. *Torrey v. Bank of Orleans*, 9 Paige, 649; *Van Epps v. Van Epps*, Id. 257; *Iddings v. Bruen*, 4 Sandf. Ch. 223; *Ackerman v. Emott*, 4 Barb. 626; *Conger v. Ring*, 11 Id. 356; *Johnson v. Bennett*, 39 Id. 237; *Gallatian v. Cunningham*, 8 Cow. 361; *Hawley v. Cramer*, 4 Id. 717; *Green v. Winter*, 1 John. Ch. 26; *Gardner v. Ogden*, 28 N. Y. 327; *De Caters v. De Chaumont*, 3 Paige, 178; *Dobson v. Racey*, 3 Sandf. Ch. 60; *Colburn v. Morton*, 1 Abb. Dec. 378; s. c. 3 Keyes, 296; 5 Abb. N. S. 308; *Fulton v. Whitney*, 66 N. Y. 548.

This principle is applicable to an assignee for the benefit of creditors. *Chapin v. Weed*, Clarke, 470.

And it makes no difference that the trustee acted from the best motives, and that the sale was fairly conducted, and that the price obtained was full and ample, the courts will open and order a resale if the parties—the *cestui que trust*—are not satisfied with it, and their bill is filed within a reasonable time. *Johnson v. Bennett*, 39 Barb. 237. Nor is it material that the sale was made at auction or by a judicial decree. *Gallatian v. Cunningham*, 8 Cow. 361; *Davoue v. Fanning*, 2 Johns. Ch. 252.

What will be deemed a reasonable time for creditors to object will depend upon the exercise of the discretion of the court, taking all the circumstances of each particular case into consideration. *Hawley v. Cramer*, 4 Cow. 717.

Nor can the sale be effected through a third person who acts for the trustee. *Ames v. Downing*, 1 Bradf. 321. And the rule applies equally to a person who stands in a relation of confidence to the trustee—he cannot become a purchaser. If he does, he becomes chargeable as trustee, and must reconvey or account for the value of the property. *Gardner v. Ogden*, 28 N. Y. 327.

Where a trustee bids in the property at the sale for himself, the transaction is not void, but voidable at the election of the *cestui que trust*, and the latter may, if he choose, hold the trustee to the consequences of his act. And when there is no legal incapacity in the *cestui que trust*, and he has full knowledge of all the facts, and is free from undue influence arising out of the relation of the parties, a clear and unequivocal affirm-

ance of the sale may conclude him. *Boerum v. Schenck*, 41 N. Y. 182.

The rule applies equally to property not included in the trust, if it is connected with the trust property in such a way that its sale for less than its value will diminish the trust fund (*Fulton v. Whitney*, 66 N. Y. 548), and to liens or securities upon the trust estate. If he buys them at a discount he cannot turn the purchase to his own advantage. *Green v. Winter*, 1 Johns. Ch. 26; *Holdrige v. Gillespie*, 2 Id. 30.

If the property is purchased in the name of a third person, or if the trustee has conveyed away the property to a purchaser in good faith, so that a resale cannot be ordered, the trustee may be charged with the value of the property. *Ames v. Downing*, 1 Bradf. 321.

The fact that the assignment is subsequently set aside as fraudulent, does not affect the duty or the liability of assignees who have made an unlawful purchase of the property conveyed to them under the assignment, and upon an accounting by the assignee upon a decree declaring the assignment fraudulent and void, they must account for the difference between the sum paid by them, and the value of the property purchased. *Colburn v. Morton*, 3 Keyes, 296; s. c. 1 Abb. Dec. 378; 5 Abb. Pr. N. S. 308.

If there are circumstances under which it becomes necessary or proper that the trustee should be permitted to become a bidder, as where he has a personal interest which may otherwise be sacrificed, the court will substitute the master or other person to conduct the sale. *De Caters v. De Chaumont*, 3 Paige, 178.

§ 333. *Sale of uncollectible claims.*—Under the provisions of the bankrupt act, an assignee was authorized to sell, under the direction of the court, any outstanding claims which could not be collected by him without unreasonable or inconvenient delay or expense. R. S. U. S. § 5064. So, by the rules of court, receivers may by leave of court sell desperate debts and all other doubtful claims to personal property, giving at least ten days public notice of the time and place of such sale. Rule 84.

The general assignment act makes no provision for the disposition of such claims, and if no express direction is contained in the assignment, it seems that under the general direction to sell, the assignee, for the purpose of winding up the trust, may sell such uncollectible claims. He may apply to the court for directions as to the disposition of such claims, but as we have seen (*ante*, § 294), to make the order of the court a protection to the assignee, it must be obtained on notice to those interested in the estate.

§ 334. *Sales in contravention of the trust.*—It is provided by the Revised Statutes (1 R. S. 730, § 65 ; 2 R. S. 6th ed. 1110, § 78), that “where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees in contravention of the trust shall be absolutely void.” In *Briggs v. Davis* (20 N. Y. 15 ; s. c. 21 N. Y. 574), where the assignees of land in trust for the payment of debts, reconveyed to the grantor, reciting that the trusts had been executed, and in fact, the debts had not all been paid, and the debtor then mortgaged the land to one having no actual notice of the trust, it was held that the reconveyance being in contravention of the trust was void, and that the legal estate remained in the trustees. And before the statute the rule was that a conveyance in breach of trust, and the grantees who took land with knowledge of the trust, became chargeable with the trusts. *Shepherd v. McEvers*, 4 Johns. Ch. 136 ; see *Partidge v. Havens*, 10 Paige, 618 ; and see also *Fitzgerald v. Topping*, 48 N. Y. 438 ; *Russell v. Russell*, 36 N. Y. 581.

§ 335. *Conveyance by attorney.*—It has been thought that an assignee for the benefit of creditors might convey land by attorney, though there be no special authority given in the assignment to delegate his power (Burrill on Assignments, 3d ed. § 415), but inasmuch as the relation of the assignee is one of personal trust and confidence, it would appear that in analogy to the principles applicable to executors and testamentary trustees, the assignee could not delegate his authority. *Berger*

v. *Duffy*, 4 Johns. Ch. 368; *Newton v. Bronson*, 13 N. Y. 587.

The assignee cannot be required to assume any risk as to the title to the property. He passes it over in the same plight in which he received it, and can be expected to make no covenants, except against his own acts. *Perry on Trusts*, § 786.

§ 336. *Trustees of insolvent debtors appointed under Revised Statutes ; Right to sue ; Penalty for concealing property.*—The trustees of insolvent debtors are required to give notice to persons indebted to the insolvent, to render an account of the sums due, and to pay over the money, but “notwithstanding any such notice, the trustee may sue for and recover any property or effects of the debtor, and any debts due to him, at any time before the day appointed for the delivery or payment thereof.” 2 R. S. 43, § 10; 3 R. S. 6th ed. 38, § 12; 2 Edm. 44; 1 Fay’s Dig. 388.

“Every person indebted to such debtor, or having the possession or custody of any property or thing in action belonging to him, who shall conceal the same and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action to the trustees or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed, which penalties may be recovered by the trustees.” 2 R. S. 43, § 11; 3 R. S. 6th ed. 38, § 13; 2 Edm. 44; 1 Fay’s Dig. 388.

CHAPTER XXV.

LIABILITY OF ASSIGNEES.

§ 337. *In general*.—Trustees are in general accountable for the discharge of their duties under the trust only to a court of equity. That court is as solicitous to protect a faithful, as it is to punish a faithless trustee. *Minuse v. Cox*, 5 Johns. Ch. 441, 448. “And where trustees act in good faith and with due diligence, they receive the protection and favor of the court, and their acts are regarded with the most indulgent consideration; but when they betray their trust or grossly violate their duty, or when they have been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict, if not vigorous justice.” Burrill on Assignments, 3d ed. § 462.

§ 338. *Extent of liability*.—An assignee is not bound to accept the office, but if he accept he is bound to discharge its duties, and he cannot escape liability, except by performance.

The measure of his liability is the measure of his duty. It is not demanded of him that he act with all the prudence and sagacity that might have been used. *Franklin v. Osgood*, 14 Johns. 527. It is enough if he act upon the same principles which actuate cautious and prudent men in the transaction of their own affairs. *Higgins v. Whitson*, 20 Barb. 141; *Litchfield v. White*, 7 N. Y. 438; aff’g 3 Sandf. 545; *Jacobs v. Remsen*, 18 Barb. 549; *Lansing v. Lansing*, 45 Barb. 182; s. c. 31 How. Pr. 55; 1 Abb. Pr. N. S. 280.

In regard to trust property in the hands of trustees, all that the *cestuis que trust* can claim of the trustees is, 1st. What the trustees may have received for property, upon a fair sale, together with what they may have earned by its use; or 2d. The value of the property at the time it came into their hands.

When the trustees have not derived a profit from the use of property, and the property itself has been lost by the fault

of the trustees, its value at the time of its loss is the measure of the liability of the trustees. *Duffy v. Duncan*, 32 Barb. 587; aff'd in 35 N. Y. 187.

They will not be chargeable with imaginary values or more than they have received, unless there is evidence of gross negligence, amounting to willful default. *Osgood v. Franklin*, 2 Johns. Ch. 2.

Trustees, acting with good faith, are treated with liberality and indulgence, and if there is no willful misconduct or fraud on the part of a trustee, he will not be held responsible for a loss, especially where he acts with the advice of counsel. *Thompson v. Brown*, 4 Johns. Ch. 619.

§ 339. *Breach of trust*.—But when the assignee is guilty of any breach of trust, either by negligence in the performance of his duties, or by any wrongful act connected with the administration of the trust estate, he will be chargeable with all losses that may result therefrom, and may be charged with interest, whether any is realized by him or not. Thus, if trustees deposit money in bank to their own credit, or mingle the trust funds with their own funds (*Duffy v. Duncan*, 35 N. Y. 187; aff'g 32 Barb. 587; *Mumford v. Murray*, 6 Johns. Ch. 1; *Hood's Estate*, 1 Tuck. 396; *Case v. Abeel*, 1 Paige, 393; *Utica Ins. Co. v. Lynch*, 11 Id. 520), or if they place their papers and receipts in the hands of their solicitor so that he can receive their money and misapply it (*Ghost v. Waller*, 9 Beav. 497; *Rowland v. Witherden*, 3 Mac. & G. 568), or if the money is so paid into bank that it may be drawn out upon the check of one trustee and misapplied (*Clough v. Bond*, 3 M. & Cr. 490; *Clough v. Dixon*, 8 Sim. 594), or if they neglect to sell property when it ought to have been sold (*Phillips v. Phillips*, Freem. Ch. 11), or suffer money to remain upon personal security (*Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Mad. 290), or upon an unauthorized security (*Hancom v. Allen*, 2 Dick. 498 and n.; *Howe v. Dartmouth*, 7 Ves. 137), or if the money is left improperly or unadvisedly in the hands of a cotrustee, so that he has an opportunity to misapply it—all the trustees will be responsible for any loss that may occur to the trust fund. *Langford v.*

Gascoyne, 11 Ves. 333; *Shipbrook v. Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Underwood v. Stevens*, 2 Nur. 712; *Hardy v. Metropolitan Land Co.* L. R. 7 Ch. 429; *Perry on Trusts*, § 444.

He is liable for every loss sustained by reason of his negligence, want of caution or mistake, as well as for positive misconduct. Thus, he is liable for neglecting to recover debts assigned (*Winn v. Crosby*, 52 How. Pr. 174; *Royall's, Adm'r, v. McKenzie*, 25 Ala. 363), for omitting to recover assigned property from the debtor (*Pingree v. Comstock*, 18 Pick. 46), and for permitting the debtor to retain possession of assigned property and receive the proceeds. *Harrison v. Mock*, 16 Ala. 616. If through any misapprehension on the part of the trustee, he makes a payment to a person not authorized to receive it, he will be held personally responsible for this application. *Perry on Trusts*, 2d ed. § 927; *Neffs' Appeal*, 57 Penn. St. 91; *Miller v. Proctor*, 20 Ohio St. 444), for the reason that he is not bound to make such payment in any case of doubt, except under the order of the court.

If the assignee make an unauthorized sale of the property or purchase it himself (*ante*, § 332), a resale may be ordered when that can be done without prejudice to the rights of innocent persons, or he may be charged with the value of the property so sold. *Colburn v. Morton*, 1 Abb. Dec. 378; s. c. 1 Keyes, 296; 5 Abb. Pr. N. S. 308.

And it is a general principle that a trustee is not allowed to make any profit out of the trust fund for his own benefit. *Holridge v. Gillespie*, 2 Johns. Ch. 30.

And if he employs the trust funds in trade, whereby he makes more than simple interest, he will be charged with the whole profits, either by making periodical rests and charging him with compound interest, or in such other manner as will best carry out the principle of giving to the *cestuis que trust* the benefit of all profits made beyond the simple interest. *Utica Insurance Co. v. Lynch*, 11 Pai. 520.

For this reason, if he compromise claims against the estate for less than their face, he can charge in his account only the amount actually paid, and not the face of the claim so satisfied. *Ireland v. Potter*, 16 Abb. Pr. 218; s. c. 25 How. Pr. 175.

§ 340. *Liability for services.*—It is undoubtedly true, as a general rule, that where a trustee employs agents in the execution of his trust, they are to look to him individually, and have no lien upon the trust fund for their compensation. *Noyes v. Blake-man*, 6 N. Y. 567. This principle has been frequently applied to executors and administrators. *Austin v. Munro*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 N. Y. 315; *Bloodgood v. Sears*, 64 Barb. 71; *Mygatt v. Wilcox*, 45 N. Y. 306; *Bowman v. Tallman*, 2 Robt. 385. To this rule there appears to be an exception. Where the trustee is without funds, and the necessity arises for expenditures in order to protect the estate from spoliation, he may either make them himself and be allowed for them in the passing of his accounts, or may engage others to do it on the credit of the fund, in which case he will bind the trust property by his contract. *Noyes v. Blakeman*, 6 N. Y. 567, 580; *Randall v. Dusenbury*, 39 Supr. Ct. (J. & S.) 174; see *Chouteau v. Suydam*, 21 N. Y. 179. In the case of *Davis v. Stover* (16 Abb. Pr. N. S. 225), it was held that the reasonable value of services actually rendered by an agent upon the faith of an express agreement that the compensation is to be paid out of the estate may, the necessity for their rendition being conceded, constitute an equitable set-off to any claim or demand which the estate may have against the agent.

But although the assignee is liable personally to those whom he may employ to assist him in reference to the management of the affairs of the estate, yet he will be allowed all such disbursements, if proper and justifiable and for the benefit of the estate, upon the settlement of his accounts. *Mc Whorter v. Benson*, Hopk. 28; see *post*, chap. XXVIII.

A trustee is responsible for the faithful conduct and competency of all his subordinates and assistants, whether strangers, attorneys or contractors. *Brown's Accounting*, 16 Abb. Pr. N. S. 457, 466, citing *Chambers v. Minchin*, 7 Ves. 196; *Langford v. Gascoyne*, 11 Id. 333; *Robertson v. Armstrong*, 28 Beav. 123.

§ 341. *Liability for rent.*—We have already had occasion to refer to the cases in which an assignee may reject onerous property upon which he may be required to make payments.

(See *ante*, § 304). It remains to consider the instances in which he will be held in law to have accepted such property, and thereby become liable to meet the conditions and obligations with which the property is burdened. Among these, that which most frequently arises is the obligation of the assignee to pay rent of leasehold property held by the assignor.

As has been pointed out in another section, the assignee has a right to reject the lease, and thus escape the liability upon its covenants. He will not be presumed to have accepted, and to have charged himself or the assigned estate with the conditions attached to it, unless the lease is specifically mentioned in the assignment, or he has acted in such a way in respect to the leasehold premises as to show that he has elected to take the interest which the insolvent lessee had in them. *Journey v. Brackley*, 1 Hilt. 447, 453.

What acts on the part of the assignee will amount to such acceptance has given rise to much discussion.

The assignee has the right to enter the demised premises for the purpose of taking possession of the assigned property, and the fact that he does so, and takes an inventory of the property, and removes the assigned goods, staying no longer than is necessary for that purpose, will not render him liable for the rent. *Lewis v. Burr*, 8 Bosw. 140. And the fact that the assignee collects of the sub-tenants certain sums which were due from them really for rent of the premises, but which were inserted in the schedules as due on open account, does not fix a liability upon him for rent. *Dennistown v. Hubbell*, 10 Bosw. 155. But where he enters upon the premises and collects the rent from the sub-tenants, and the entry is not limited merely to the purpose of taking possession of the assigned goods, he will be held to have accepted the lease. *Jones v. Hausman*, 10 Id. 168.

And if the assignee enter upon the premises, and occupy them until removed by summary proceedings, and the occupation is not shown to have been for the temporary purpose of taking possession of and removing the assigned goods, he will be deemed to have accepted the lease. *Astor v. Lent*, 6 Bosw. 612. See *Muir v. Glinsman*, cited in *Journey v. Brackley*, 1 Hilt. 447, 455; *Young v. Peyser*, 3 Bosw. 308.

The assignee may take a reasonable time to ascertain whether the lease is valuable; he may even offer it for sale at auction as an experiment without becoming liable. *Turner v. Richardson*, 7 East, 335; *Wheeler v. Bramah*, 3 Camp. 340; *Lindsay v. Lunbert*, 12 Moore, 209. But if he finds a purchaser and receives a deposit, and then permits the sale to fall through, he will be liable. *Hastings v. Wilson*, Holt, 290. He may go himself, or place persons temporarily upon the premises to take charge of the goods of the insolvent, and dispose of them there. *How v. Kennett*, 3 Adol. & El. 659.

But intermeddling with and assuming the management of the premises will amount to an election to accept. *Thomas v. Pemberton*, 7 Taunt. 206.

Thus, in an early case, where the assignees of a bankrupt, who was lessee of a pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises until the 10th, and ordered them to be milked there it was held that they thereby became tenants to the lessor. *Welch v. Myers*, 4 Camp. 368.

And where the assignee kept the bankrupt in possession of the premises, carrying on the business for the benefit of the creditors, and afterwards disclaimed the lease by letter to the landlord, it was held that the assignee, notwithstanding such disclaimer, had elected to accept the lease, and was liable for the rent. *Clark v. Hume*, Ry. & M. 207. So entering and taking possession was held to bind the assignees, though the bankrupt's effects were on the premises, and the keys were given up immediately after the effects were sold. *Hanson v. Stevenson*, 1 B. & A. 303. See also *Hastings v. Wilson*, 1 Holt N. P. 290.

But even where the assignee is held by his acts to have accepted the lease, yet, in the absence of an express agreement to apportion the rent, he will not be liable for rent which became payable before he entered. Thus, where the rent was payable monthly in advance, and the assignee entered in the middle of the month, it was held that he was not liable for any portion of the rent of the current month, but only under the covenants of the lease for rent subsequently falling due. *Pilzemaier v. Welsh*, Daily Reg. April 24, 1878, McAdam, J.

And where there is an outstanding lease under seal, and the

assignee is not held as assignee of the lease, he cannot be chargeable for use and occupation of the premises. So long as the relation of landlord and tenant exists between the landlord and the assignor under the lease, the same relation cannot exist between the assignee and the landlord in reference to the same premises. *Kiersted v. O. & A. R. R. Co.* 69 N. Y. 343. See also *Journey v. Brackley*, 1 Hilt. 447, 460.

§ 342. *When chargeable with interest.*—In an early case it was laid down by Chancellor Kent, as a general proposition, that executors and all other trustees are chargeable with interest, if they have made use of the trust money themselves, or have been negligent either in not paying it over, or in not investing it or loaning it so as to render it productive. *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508. See also *Manning v. Manning*, 1 Id. 527. And in another case, where an executor had employed the trust money in trade for his own benefit, he held him properly chargeable with compound interest. *Schiefflin v. Stewart*, 1 Johns. Ch. 620. In a later case, Chancellor Walworth held a receiver, who had mingled the trust funds with his own, chargeable with simple interest, although the profits he had made on the trust fund were not equal to simple interest. *Utica Insurance Co. v. Lynch*, 11 Paige, 520.

In *Duffy v. Duncan* (32 Barb. 587; aff'd 35 N. Y. 187) the assignees were charged with interest at the rate of seven per cent. on moneys remaining in their hands after the expiration of eighteen months, although the trustees testified that they were ready at all times to have paid the plaintiff. See also *Brown v. Ricketts*, 4 Johns. Ch. 303; *Tomlinson v. Smallwood*, 15 N. J. Eq. 286. As a general rule executors and administrators are chargeable with interest after the expiration of six months. *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; *Jacot v. Emmet*, 11 Paige, 142; *Burtis v. Dodge*, 1 Barb. Ch. 77.

But compound interest will not be charged except upon the ground of gross delinquency or intentional violation of duty. *Ackerman v. Emott*, 4 Barb. 626; *Lansing v. Lansing*, 45 Id. 182; s. c. 1 Abb. Pr. N. S. 280; 31 How. Pr. 55.

And unless there is proof of culpable neglect, a trustee will not be charged with interest where interest has not been re-

ceived. *Minuse v. Cox*, 5 Johns. Ch. 44; see *Clark v. Craig*, 29 Mich. 398.

§ 343. *Suits by creditors against the assignee.*—The assignee cannot be sued at law by a creditor to recover his proportionate part of the proceeds of the estate. Such an action may be maintained after a dividend has been declared, and after a refusal on the part of the assignee to pay it. *Peck v. Randall*, 1 Johns. 165; *Brown v. Buller*, Doug. 407. So a creditor cannot maintain an action against an assignee to recover for a debt due him, on the ground that the assignee has been guilty of a breach of trust in neglecting to collect and apply in discharge of the trust an amount due him upon the sale of the assigned property. *Bishop v. Houghton*, 1 E. D. Smith, 566. A covenant in the assignment, on the part of the assignee, to discharge the trusts, is not made to individual creditors so as to enable them to bring an action at law upon it. *Reed v. Allerton*, 3 Robt. 551, 562. The creditor's remedy is to compel an accounting and determination of his proportionate share.

§ 344. *Remedy against assignee for breach of trust; Arrest.*—If an assignee has been guilty of a breach of trust, the proper remedy is by a suit in the names of or for the benefit of all the parties beneficially interested, to compel the assignee to account for and pay over the funds in his hands, and proceed to execute the trust; or replace him by a new trustee; or to apply for a receiver with power to collect the outstanding debts, and apply them as provided in the assignment; or if the fund has been impaired by the assignee's neglect, to require him to make good the loss. *Bishop v. Houghton*, 1 E. D. Smith, 566.

Money received by an assignee is received not as his own, but in a fiduciary capacity. Hence, when assignees have money in their possession which they refuse to apply proportionately to the payment of a creditor who is entitled to a share, there arises a cause of action authorizing their arrest, under the Code, *i. e.*, for money received by a person in a fiduciary capacity, and upon a judgment in such an action, execution against the person of the judgment debtor may be issued. The fact that an accounting is necessary in such an action, to ascertain the

amount to which plaintiff is entitled, affords no excuse for the non-payment of the money, when ascertained. *Roberts v. Prosser*, 53 N. Y. 260.

§ 345. *Assignees, when protected*.—Assignees are entitled to indemnity for all liabilities and expenditures made by them in good faith under an assignment which is subsequently set aside by judicial decree (*ante*, § 248), and where they have paid over money to *bona fide* creditors of the assignor in pursuance of the assignment, they will be allowed for such payments. *Wakeman v. Grover*, 4 Paige, 23, 24; and see *ante*, § 248, and cases cited. So also, when they have made sales of the assigned property in good faith, provision will be made for the ratification of such sales. *Barney v. Griffin*, 4 Sandf. Ch. 652; *aff'd* 2 N. Y. 365.

§ 346. *Liability of co-assignee*.—It was determined, as early as the case of *Townley v. Sherborne* (Bridg. 35), that a trustee was not liable for the acts or defaults of his co-trustee, unless there was some practice, fraud or evil dealing between them to the prejudice of the trust. In the same case it was decided that, if the trustees join in signing a receipt for money, they should each be responsible for it; but this rule has been qualified, for since all the trustees must join in a receipt, while any one of the joint trustees may receive the money, it would be unjust to punish a trustee for doing that which the law compels him to do. Hence, where a trustee joins in a receipt merely for conformity, and without receiving any of the money, he will not be answerable for the misapplication of the money by his co-trustee who receives it. *Monnell v. Monnell*, 5 Johns. Ch. 283; *Kip v. Denniston*, 4 Johns. 23; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Perry on Trusts*, § 416.

But the receipt will be presumptive evidence that the moneys came into the hands of both trustees, and the burden is upon the trustee who seeks to escape liability to show that he signed the receipt merely for conformity, and that, in point of fact, he received none of the money. *Monnell v. Monnell*, 5 Johns. Ch. 394; *Manahan v. Gibbons*, 19 Johns. 427.

“But whenever either a trustee or an executor, by his own

negligence or laches, suffers his co-trustee or co-executor to receive and waste the trust fund or assets of the testator, when he has the means of preventing such receipt and waste by the exercise of reasonable care and diligence, then and in such case such trustee or executor will be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor." *Clark v. Clark*, 8 Paige, 152; *Mumford v. Murray*, 6 Johns. Ch. 1; *White v. Bullock*, 20 Barb. 91; *Mesick v. Mesick*, 7 Barb. 120; *Brown's Accounting*, 16 Abb. Pr. N. S. 457; *Banks v. Wilkes*, 3 Sandf. Ch. 99.

And where a trustee turns over the fund to his co-trustee, he will be answerable for the latter in the same manner as he would have been for a stranger. *Clark v. Clark*, *supra*; *Mesick v. Mesick*, *supra*; *Monnell v. Monnell*, 5 Johns. Ch. 283. So a trustee who suffers funds to pass improperly into the hands of his co-trustee is chargeable with any loss arising from such negligence or breach of trust. *Mumford v. Murray*, 6 Johns. Ch. 1.

It is the duty of a trustee to protect the estate from any misfeasance by his co-trustee; therefore, when any such intended purpose comes to his knowledge, he should seek promptly to prevent it by injunction, if necessary; and when the act has already been committed, he should take the necessary measures to compel the restitution of the property, and the application of it to the purposes and objects of the trust, and a failure to do this will make him liable for a breach of his duty. *Tif. & Bul. on Trust*, 573; *Mumford v. Murray*, 6 Johns. Ch. 1; *Bowman v. Rainetaux*, Hoff. Ch. 150. And a trustee may maintain an action against his co-trustee to restrain a violation of duty, and even succeed in obtaining his removal. *Bartlett v. Hatch*, 17 Abb. Pr. 461; see *Wood v. Brown*, 34 N. Y. 337.

One of two assignees cannot relieve himself of the responsibility of the trust by simply leaving the exclusive possession and management of the whole business to the other. If he do so, he will be responsible for the misconduct and violation of duty of the other. *Bowman v. Rainetaux*, *supra*.

CHAPTER XXVI.

DEATH, REMOVAL, RESIGNATION OR DISABILITY OF ASSIGNEE.

§ 347. *In general.*—Courts of equity have a general jurisdiction of trusts and trustees, and, as part of this jurisdiction, they have power to remove and appoint trustees. In this State, this power is expressly conferred by the Revised Statutes, in the case of express trusts, upon the Supreme Court under the provisions cited below. In addition to these provisions applicable to trustees generally, the general assignment act has made special provision for the removal and death of assignees for the benefit of creditors, and express provision is also made by the Revised Statutes for the removal and appointment of trustees of insolvent debtors. It will be convenient, in the first place, to consider the provisions applicable to trustees generally, then those which relate specifically to general assignees for the benefit of creditors, and lastly those which refer exclusively to trustees of insolvent debtors.

§ 348. *Survivorship.*—In this State, every estate vested in trustees is held by them as joint tenancy. 1 R. S. 727, § 44; 2 R. S. 6th ed. 1104, § 44. The rule is, as we have already seen (*ante*, § 295), that the trust vests in all the trustees as a unit, and they must all act. Upon the death of any one of the trustees, the trust property and the right to act devolves upon the survivors. *Shook v. Shook*, 19 Barb. 653.

Upon the death of the surviving trustee, at common law, a trust in land, with the legal title, devolved upon the heirs of the trustee; but if it were a trust of personal property, it passed to the executor of the trustee, not as assets, but the executor took as trustee. *Dias v. Brunell's Ex'r*, 24 Wend. 1. But the Revised Statutes have changed this rule by declaring that the trust shall not descend to the real or personal representatives of the surviving trustee, but shall be vested in the Court of Chancery

(now Supreme Court), to be executed under its discretion. 1 R. S. 730, § 68; 2 R. S. 6th. ed. 1110, § 81.

Some doubt has arisen as to whether this provision is applicable to trusts of personal property. Thus Mr. Justice Hunt, in *Emerson v. Bleakley* (2 Abb. Dec. 22, 27), says: "I understand the law to be that personal estate held in trust upon the death of the trustee descends to, and the title vests in the personal representatives of the trustee, and that the provisions of the statute giving the title to a trustee to be appointed by the court apply to trusts in real estate only." *Savage v. Burnham*, 17 N. Y. 561; *Kane v. Gott*, 24 Wend. 641; *Bunn v. Vaughan*, 1 Abb. Dec. 253. But in *Hawley v. Ross* (7 Paige, 103), this precise point appears to have been before the chancellor, and he there decided that personal property held in trust did not pass to the personal representatives, but that it was the duty of those interested in the trust to obtain the appointment of a new trustee, and such was the ruling in *Curtis v. Smith* (60 Barb. 1), and in *Bowman v. Rainetaux* (Hoff. Ch. 150), Vice Chan. Hoffman assuming that the title to the trust property passed to the administrator, said: "I think it would be going too far to hold that it is incumbent upon the administrator of an assignee to assume the supervision of the trust property, or to be legally responsible for its administration. It seems to me the creditors or *cestui que trust* provided for should see that an active trustee was appointed. And see the provisions of the general assignment act, cited *post*, §§ 353, 358.

§ 349. *Resignation and removal.*—In reference to the resignation and removal of trustees the statute provides that, "upon the petition of any trustee, the Supreme Court may accept his resignation and discharge him from his trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons interested in the execution of the trust may require." 1 R. S. 730, § 69; 2 R. S. 6th ed. 1111, § 82.

"Upon the petition or bill of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established, the Supreme Court may remove any trustee who shall have violated or threatened to violate his trust,

or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust." 1 R. S. 730, § 70; 2 R. S. 6th ed. 1111, § 83.

"The Supreme Court shall have full power to appoint a new trustee in place of a trustee resigned or removed; and when, in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion, may appoint new trustees, or cause the trust to be executed by one of its officers under its direction." 1 R. S. 730, § 71; 2 R. S. 6th ed. 1111, § 84.

"The three last sections shall extend only to cases of express trust." 1 R. S. 730, § 72; 2 R. S. 6th ed. 1111, § 85.

§ 350. *Renunciation*.—If a trustee once accepts the office, he cannot, by his sole action, be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: First, he may be removed and discharged, and a new trustee substituted in his place by proceedings before a court having jurisdiction over the trust; Second, he may be discharged and a new trustee appointed by the agreement and concurrence of all the parties interested in the trust; and, Third, he may be discharged and a new trustee appointed in the manner pointed out in the instrument creating the trust, if it makes any provision upon that subject.

The provisions of the statute (*ante*, § 349) in reference to the resignation of a trustee apply only to those cases where the trustee has become vested with the estate, or has made himself answerable as trustee by accepting the trust, or by doing some act in his character as trustee; if he has renounced and not accepted the trust, no judicial proceeding is necessary to make the renunciation complete. *Matter of Stevenson*, 3 Paige, 420.

But after he has once accepted, he cannot renounce or discharge himself from liability by resignation without an order of the court or the consent of all the parties. *Thatcher v. Candee*, 3 Abb. Dec. 387; s. c. 3 Keyes, 160; *Shepherd v. McEvers*, 4 Johns. Ch. 186; *Cruger v. Halliday*, 11 Paige, 319; *Ridgeley v. Johnson*, 11 Barb. 527; *Deifendorf v. Spraker*, 10

N. Y. 246; *Bowman v. Rainetaux*, Hoff. 150. Nor will his refusal or failure to act empower the other trustees to act without him. *Brennan v. Wilson*, 4 Abb. N. C. 279.

Previous to the Revised Statutes it appears that the proceeding was by bill in equity, upon notice to all persons interested in the trust. *Matter of Van Wyck*, 1 Barb. Ch. 565; *Matter of Wadsworth*, 2 Id. 381. When the application is on the part of the trustee to be allowed to resign, and for the appointment of his successor, or for the appointment of a successor on the death of the trustee, it appears that the application need not be on notice to all parties, but that the matter of notice rests in the discretion of the court. *Matter of Robinson*, 37 N. Y. 261; *Reed v. Allerton*, 3 Robt. 551. Although it is otherwise when the application is for the removal of a trustee, and the passing and settling of his accounts. *Matter of Robinson*, *supra*.

A trustee cannot resign as a matter of course. He must show sufficient cause. *Craig v. Craig*, 3 Barb. Ch. 76, 100.

And where a trustee resigns without any reason other than his own wish, he will be compelled to pay the costs of the proceeding, and will be allowed no commissions. *Matter of Jones*, 4 Sandf. Ch. 615.

Where one of two or more joint trustees refuses to accept, and executes a formal renunciation of the trust, he cannot afterwards accept and execute the trust unless it be under a new appointment as trustee. *Matter of Van Schoonhoven*, 5 Paige, 559.

It is not obligatory on the court to appoint a new trustee in the place of a trustee who resigns, when there are other trustees. It may leave the other trustees to execute the trust or appoint another as may be thought best. *In the Matter of Bull*, 45 Barb. 334; *King v. Donnelly*, 5 Paige, 47.

§ 351. *Removal of assignee for misconduct.*—A Court of Chancery has general jurisdiction of all cases of trust, and had the power by its general authority, independent of any statute, to displace a trustee on good cause shown, and to substitute another in his stead. *People v. Norton*, 9 N. Y. 177. It has been said that independent of the statute this power can be

exercised only on a bill filed, and the presence or consent of all parties. *Reed v. Allerton*, 3 Robt. 551; *Matter of Van Wyck*, 1 Barb. Ch. 565; *Matter of Wadsworth*, 2 Id. 381.

But whatever may be the form of procedure, there can be no question as to the authority of the Supreme Court to remove a trustee for any misconduct 'which endangers the trust property. Story's Eq. § 1289. And this jurisdiction exists and will be equally enforced whether the instrument creating the trust does or does not contain a power to appoint new trustees. Hill on T. 191. The court will adapt its relief to the exigencies of the case, and having first removed the trustee will then proceed to supply the vacancy, if necessary. *Wood v. Brown*, 34 N. Y. 337.

A trustee may be removed when he refuses to perform the duties of his trust (*Matter of Mechanics' Bank*, 2 Barb. 446); or if he mingle the trust funds with his own funds (*Drew v. Cozzens*, 7 Robt. 178), though this may not be enough if it is not alleged that the fund is in danger. *Orphan Asylum v. McCartee*, 1 Hopk. 429.

So, an assignee may be removed if he refuse to give proper information to the creditors in regard to their rights or the value of the assets, or if he suppress information in the interest of particular creditors. *In re Perkins*, 8 N. B. R. 56. So, where the assignee refused the creditors access to the debtor's books, and there was other suspicious transactions between the assignor and assignee, this was regarded as ground for the appointment of a receiver, on an application for his removal. *Manning v. Stern*, 1 Abb. N. C. 409.

So, when an assignee in bankruptcy neglected to take proper measures to secure the bankrupt's property, and had, under the advice of counsel, refused to pay taxes on the bankrupt's estate and allowed it to be sold, it was regarded as proper ground for his removal. 7 N. B. R. 56.

And when the assignee is guilty of a breach of trust, or misconduct in the discharge of his duties. *Exp. Townshend*, 15 Ves. 470; *Exp. Perryer*, 1 M. D. & D. 276; *Exp. Reynolds*, 5 Ves. 707; *Exp. Ashmore*, 3 M. D. & D. 461; see *in re Sacchi*, 6 N. B. R. 398; *In re Perkins*, 8 N. B. R. 56; *Van Epps v. Van Epps*, 9 Paige, 237.

So it appears that a person who is a non-resident of the State, is disqualified and may be removed. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178; *Exp. Gray*, 13 Ves. 274.

The insolvency of the assignee has in a number of cases been regarded as a sufficient disqualification, *Keyes v. Brush*, 2 Paige, 311; *Haggerty v. Pittman*, 1 Paige, 298; *Reed v. Emery*, 8 Id. 417; *Connah v. Sedgwick*, 1 Barb. 210. And the statute cited above (§ 349), expressly provides for the removal of any trustee "who shall be insolvent, or whose insolvency shall be apprehended." Still it is believed that the mere fact of insolvency, unaccompanied by other reasons, where the assignee has given a bond as required by the act (*ante*, § 280), would not be regarded by the court as sufficient ground for removal (see *ante*, § 149).

The common law has made no provision for the execution of a joint trust by one of the trustees, when the co-trustee becomes incompetent to execute the trust, though still alive. In such a case the court may remove the incompetent trustee, and the trust may be executed either by the remaining trustee or by him and such other person as may be substituted. *Matter of Wadsworth*, 2 Barb. Ch. 381.

§ 352. *Appointment of receiver*.—During the pendency of the proceedings for the removal of a trustee, the court may appoint a receiver to take charge of the trust property. Such is the proper course whenever it is shown that the fund is in danger by reason of the insolvency of the assignee (*Haggerty v. Pittman*, 1 Paige, 298; *Connah v. Sedgwick*, 1 Barb. 210), or when the assignee has been guilty of any act which renders it necessary that he should be enjoined while the assigned estate requires to be actively cared for. *Manning v. Stern*, 1 Abb. N. C. 409; *Lent v. McQueen*, 15 How. Pr. 313.

§ 353. *Removal under general assignment act*.—The general assignment act provides that any person interested in the estate may apply for the removal of the assignee if he neglect, in case of a failure on the part of the assignor, to file an inventory and schedule of the assigned estate within thirty days after the date of the assignment. (*Ante*, §§ 272, 274).

The statute also provides that :

“The county judge shall, in the case provided in section three (*supra*), and may also, at any time, on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety and such other person as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon his discharge upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond to be approved as above required.” Laws of 1877, chap. 466, § 6.

Some of the causes which have been held sufficient to warrant the removal of assignees and trustees have just been referred to. § 351.

The failure of the assignee to make and file a bond for the faithful discharge of his duties, as required by the act, would undoubtedly furnish a sufficient ground for his removal. *Barbour v. Everson*, 16 Abb. Pr. 366; *Hardmann v. Bowen*, 39 N. Y. 176; *Read v. Worthington*, 9 Bosw. 617; *Van Hein v. Elkus*, 15 Supm. Ct. (8 Hun), 516. Indeed, until such bond is filed, the assignee is incompetent to perform the principal duties of his trust. (*Ante*, § 283.)

§ 354. *Practice on removal under the act.*—The proceeding for the removal of an assignee under the general assignment act is by petition setting out the grounds and reasons for which the assignee desires to resign, or upon which creditors seek to have him removed. There is no authority under the act to remove the assignee on petition of the assignor. *Matter of Horsfall*, Daily Reg. July 9, 1878.

The application must be on notice of not less than five days to the assignor, assignee, surety and such other person as

the judge may prescribe. The question of the parties and notice is one left by the statute to the discretion of the court.

But, on the authority of Robinson's case (37 N. Y. 261), it would seem that when the application is for the removal of the assignee and for the passing and settling his accounts, all persons interested in the trust property and estate should be notified and made parties to the proceeding in the absence of an excuse for the omission, and by the 11th section of the act (Laws of 1877, chap. 466, § 11; see *post*, chap. XXVIII), the county court may issue a citation for a general accounting when an assignee has been removed and ordered to account under the section cited above.

The court may order a reference to inquire into the facts and circumstances under which the resignation is ordered, or the removal sought (Matter of Miller, 15 Abb. Pr. 277, the special provisions of the order in an analogous proceeding, are given in this case), and to state the account of the retiring assignee, so that upon the coming in of the report the court may make an order removing the assignee, appointing his successor and directing the payment of the amount due from the retiring assignee. If there is danger of a loss to the estate pending such proceeding, the court has power to issue an injunction and appoint a custodian or receiver of the assigned property.

§ 355. *Continuance of proceedings on death of assignee.*—“In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days), as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety.” Laws of 1877, chap. 466, § 10.

Compare Laws of 1872, chap. 838. A similar provision in

the act of 1872 (*supra*), was held to operate retroactively, enabling a party to revive a proceeding for an accounting when the assignee had died previously to the enactment. See the *Matter of Grove*, 64 Barb. 526.

If the court have jurisdiction of the subject-matter, mere irregularity in the proceedings, or in the appointment, will not make it void in a collateral proceeding; nor can the regularity of the appointment be inquired into in a collateral proceeding. *People v. Norton*, 9 N. Y. 176; *Curtis v. Smith*, 60 Barb. 9; *Howard v. Waters*, 19 How. 529.

§ 356. *Trustees of insolvent debtors appointed under Revised Statutes; Removal from State.*—"Whenever any assignee or trustee appointed under any authority conferred by any of the provisions of title one, chapter five, and part two of the Revised Statutes, or of any previous statute relating to insolvent or imprisoned debtors, shall have removed from, and shall have continued to reside out of this State for one year, or shall hereafter remove from and continue to reside out of the State for one year, it shall be lawful for the officer who originally appointed such an assignee or trustee, or in case of his absence, death, or removal, his successor in office, or any other officer residing in the county where such assignee or trustee was resident, who by law would originally have been authorized and empowered to make an appointment of such assignee or trustee, after giving notice and an opportunity to the creditors to propose proper persons, to appoint another person in the place of such assignee or trustee so removed, or to be removed as aforesaid." Laws, 1846, ch. 158, § 1; 3 R. S. 6th ed. 36, § 5; 1 Fay's Dig. 394.

"The assignee or trustee appointed in the place of the assignee or trustee so removed, or to remove as aforesaid, shall in all respects have the like powers and authority, and be subject to the same control, obligations, and responsibilities as the assignee or trustee originally appointed; and the appointment of an assignee or trustee under the provisions of this act shall be certified and recorded as the original appointment was required to be recorded." Laws, 1846, chap. 158, § 2; 3 R. S. 6th ed. 36, § 6; 1 Fay's Dig. 394.

§ 357. *Trustees of insolvent debtors ; Removal of.*—"Such trustees shall be subject to the order of the Supreme Court and of the county court of the county in which they were appointed, upon the application of any creditor or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them ; and they may be removed by the Supreme Court for cause shown." 2 R. S. 49, § 46 ; 3 R. S. 6th ed. 43, § 51 ; 2 Edm. 50 ; 1 Fay's Dig. 392.

"Whenever any trustee shall be removed, or shall die or become incapacitated to perform his duties, the officer who originally appointed such trustee, or in his absence, death, or removal, any other officer residing in the county where such trustee was resident who by law would have been empowered to make such appointment, after giving notice and an opportunity to the creditors to propose proper persons, may appoint another in the place of such trustee, who shall in all respects have the like powers and authority, and be subject to the same control, obligations, and responsibilities ; and the said appointment shall be certified and recorded as the original appointment was required to be recorded." 2 R. S. 49, § 48 ; 3 R. S. 6th ed. 43, § 53 ; 2 Edm. 51 ; 1 Fay's Dig. 392.

"Whenever, by reason of the death of all the assignees of an insolvent debtor, appointed under any of the insolvent laws of this State, which were in force previous to the first day of January, one thousand eight hundred and thirty, there shall be no person to represent such insolvent estate, the officer who originally appointed the assignee, or in case of his absence, death or removal, any other officer residing in the county in which the original appointment was made, who by law would have been empowered to make the same, shall, upon the written application of a majority of the petitioning creditors or their representatives, appoint such person as they shall recommend, in the place of such deceased assignee or assignees, who shall in all respects have the like power and authority, and be subject to the same control, obligations and responsibilities." Laws of 1830, chap. 258, § 1 ; 3 R. S. 6th ed. 45, § 1 ; 4 Edm. 464.

§ 358. *Trustees of insolvent debtors ; Renunciation, and proceedings thereon.*—“ Any trustee appointed pursuant to the provisions of this title, who shall be desirous of renouncing the trust vested in him, may apply to the officer or court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.” 2 R. S. 49, § 49 ; 3 R. S. 6th ed. 43, § 54 ; 2 Edm. 51 ; 1 Fay’s Dig. 392.

“ If the officer who made the appointment shall not then be in office, such application may be made to a justice of the Supreme Court, or the county judge of the county residing in the same county where the appointment of such assignee was made.” 2 R. S. 50, § 50 ; 3 R. S. 6th ed. 43, § 55 ; 2 Edm. 51 ; 1 Fay’s Dig. 393.

“ Such application shall be accompanied by a full, true, and just account of all the transactions of such trustee in that character, and particularly of the property, moneys, and effects received by him ; of all payments made, whether to creditors or otherwise, and of the remaining effects and estate of the debtor, in respect to whom or whose estate he was appointed trustee within his knowledge, and the situation of the same.” 2 R. S. 50, § 51 ; 3 R. S. 6th ed. 43, § 56 ; 2 Edm. 51 ; 1 Fay’s Dig. 393.

“ To such an account shall be annexed the affidavit of the trustee that the said account is in all respects just and true, according to the best of his knowledge and belief. Which affidavit shall be subscribed and sworn to before the officer or court to whom the application is made, and shall be certified by him, or by the clerk of the court.” 2 R. S. 50, § 52 ; 3 R. S. 6th ed. 43, § 57 ; 2 Edm. 51 ; 1 Fay’s Dig. 393.

“ Such officer or court shall thereupon grant an order directing notice to be given to all persons interested in the estate of the debtor, in respect to whom or whose estate such trustee was appointed, to show cause on a day, or at a term, and at a place therein specified, why he should not be permitted to renounce his appointment.” 2 R. S. 50, § 53 ; 3 R. S. 6th ed. 43, § 58 ; 2 Edm. 51 ; 1 Fay’s Dig. 393.

“ Such notice shall be published once in each week, for six weeks successively, in the State paper, and in such other news-

papers as such officer or court shall direct." 2 R. S. 50, § 54; 3 R. S. 6th ed. 44, § 59; 2 Edm. 51; 1 Fay's Dig. 393.

"On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that the notice was duly published, the officer or court shall proceed to hear the proofs and allegations of the parties." 2 R. S. 50, § 55; 3 R. S. 6th ed. 44, § 60; 2 Edm. 52; 1 Fay's Dig. 393.

"If it shall appear that the proceeding of such trustee in relation to his trust have been fair and honest, and particularly in the collection of the property and debts vested in him, and if such court or officer be satisfied that for any reason it is inexpedient for such trustee to continue in the execution of the duties of his appointment, and that such duties can be executed by another trustee without injury to the estate of the debtor or to the creditors, and if no good cause to the contrary appear, such officer or court shall grant an order allowing such trustee to renounce his appointment and to assign the property and effects of the debtor." 2 R. S. 50, § 56; 3 R. S. 6th ed. 44, § 61; 2 Edm. 52; 1 Fay's Dig. 393.

"Such an assignment shall be executed by such trustee to such person or persons as the court or officer shall appoint for that purpose, and in the appointment such persons as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court or officer." 2 R. S. 51, § 57; 3 R. S. 6th ed. 44, § 62; 2 Edm. 52; 1 Fay's Dig. 393.

"Such an assignment shall transfer to the persons to whom it shall be made all the remaining estate and effects vested in the trustee so renouncing, and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation as the original trustee, in his name, or in that of such new assignee." 2 R. S. 51, § 58; 3 R. S. 6th ed. 44, § 63; 2 Edm. 52; 1 Fay's Dig. 393.

"Upon producing to the officer or court allowing such assignment the certificate of the assignee, duly proved by the oath of a subscribing witness that such assignment has been duly made, and all the property capable of delivery belonging to such debtor, together with all the books, vouchers, and docu-

ments relating to the estate of such debtor has been duly delivered, and also a certificate of the county clerk that such an assignment has been recorded, such officer or court shall grant to the trustee so applying an order that he be discharged from his trust." 2 R. S. 51, § 59; 3 R. S. 6th ed. 44, § 64; 2 Edm. 52; 1 Fay's Dig. 393.

"Upon such order being granted, such trustee shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall notwithstanding remain subject to any liability he may have incurred at any time previous to the granting of such order in the management of his trust." 2 R. S. 51, § 60; 3 R. S. 6th ed. 44, § 65; 2 Edm. 52; 1 Fay's Dig. 393.

"Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where such order was granted; and the petition of the trustee, the affidavit, and proceedings thereupon, with the certificate of the new assignee, shall be filed in the same office where the original papers and proceedings in respect to such debtor were filed." 2 R. S. 51, § 61; 3 R. S. 6th ed. 44, § 66; 2 Edm. 52; 1 Fay's Dig. 394.

"The expense of all proceedings in effecting such renunciation and assignment shall be paid by the trustee making the application." 2 R. S. 51, § 62; 3 R. S. 6th ed. 44, § 67; 2 Edm. 53; 1 Fay's Dig. 393.

CHAPTER XXVII.

NOTICE TO CREDITORS. PROOF OF CLAIMS.

§ 359. *Ascertaining debts to be paid.*—A general assignment for the benefit of creditors differs materially from an assignment under the insolvent or bankrupt law as to the persons having the right to claim under the assignment. In the latter case, only those creditors whose debts are provable under the terms of the statute can share in the distribution of the estate, and every creditor who comes in to prove his debt under such an assignment must be prepared to prove it in the manner pointed out by the statute. A general assignment for the benefit of creditors by its own terms devotes the debtor's property to the payment of some or all of the assignor's debts, and the debts provided for may be specified in the instrument itself, or they may be left to be otherwise determined. When the assignment provides for the payment of specific debts, neither the assignee nor any creditor claiming under the assignment can dispute their validity. *Pratt v. Adams*, 7 Paige, 615; *Jewett v. Woodward*, 1 Edw. Ch. 195; *Green v. Morse*, 4 Barb. 332; *Maynard v. Maynard*, 4 Edw. Ch. 711. The question is one of intent, to be gathered from a fair construction of the deed of assignment. If the assignee is directed to pay certain persons upon certain specified amounts, either with priorities or proportionally, the assignee who accepts the trust, and all the creditors who come in and share under it, are bound by the provisions of the deed and cannot dispute them. This proposition, which rests on the doctrine of election, that he who accepts a benefit under an instrument cannot dispute the validity of its provisions is abundantly sustained by the authorities cited above, and also by the following cases in other States. *Adlum v. Yard*, 1 Rawle, 163; *Gutzweiler v. Lackman*, 23 Mo. 168; *Burrows v. Alter*, 7 Mo. 424; *Lanahan v. Latrobe*, 7 Md. 268; *Lerry v. Bibeau*, 2 Minn. 293; *Scott v. Edes*, 3 Minn.

387; *Geisse v. Beall*, 3 Wis. 391; *Moule v. Buchanan*, 11 G. & J. 314; *Swanson v. Turkington*, 7 Heisk. (Tenn.), 612; *Irwin v. Tabb*, 17 S. & R. 422; *Busby v. Finn*, 1 Ohio St. 409. The Maryland cases are the other way. *Mackintosh v. Connor*, 33 Md. 598; *Starr v. Dugan*, 22 Md. 58; *Sixth Ward Bank v. Wilson*, 41 Id. 506. If the claims so provided for are fictitious or fraudulent or such as for any reason ought not to be paid, that will be a ground for setting the assignment aside as fraudulent and void, but it will not furnish a ground upon which a creditor claiming under the assignment as a valid instrument can dispute the claim of another creditor provided for in the same manner in the same instrument. *Pratt v. Adams*, 7 Paige, 615, 641; *Green v. Morse*, 4 Barb. 332, 342.

But there is a wide difference between a case where the assignor directs a specific debt to be paid, and where he assigns generally for the benefit of creditors. *Green v. Morse*, 4 Barb. 332, 342. In the latter case the assignees are bound to pay only such debts as the assignor was legally liable to pay at the date of the assignment, and as to such debts, the law may and does provide the method of their ascertainment. Thus, when the terms of the assignment were to pay "the debts due or to grow due from the assignor, or for which he is *liable*, to the following persons," and then followed a specification of creditors and the debts due them, in which the debt of one creditor was set down at an amount more than was justly due; it was held that the requirement was to pay only the amount for which the assignor was liable, and that the assignees might require proof as to the amount, and it was their duty to do so if they believed the amounts were not correctly stated in the assignment. *Kavanagh v. Beckwith*, 44 Barb. 192.

And when the assignment is made generally for the payment of the assignor's debts and liabilities, either the assignee or any creditor may dispute the validity of a claim presented by a creditor.

§ 360. *Notice to creditors to present claims*—The general assignment act has provided a method for ascertaining the creditors entitled to share in the distribution of the estate. It provides that "the county judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to

him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to the persons to be served, not less than once a week for six successive weeks, and if it appears that any of such creditors reside out of the State, then in like manner in the State paper." Laws of 1877, chap. 466, § 4; see Laws of 1874, chap. 600, § 1.

A similar provision in reference to executors and administrators (2 R. S. 88, § 34; 3 R. S. 6th ed. 96, § 45), furnishes all the authorities which are of any assistance in the construction of this section.

The order will be granted *ex parte*. The petition or affidavit upon which it is obtained should state facts enough to enable the judge to designate the newspapers "most likely to give notice to the creditors," and it should also be made to appear whether any of the creditors reside out of the State. If any of the creditors do reside out of the State, the notice should, as it appears, be published in three newspapers, to wit, the State paper and two newspapers designated by the judge.

The place where claims are to be presented may be named by the executor, and need not be his actual residence or place of business. *Hoyt v. Bonnett*, 58 Barb. 529; *contra*, *Murray v. Smith*, 9 Bosw. 689. But the notice must require presentment to be made to the executor himself, and not to his attorney. *Hardy v. Ames*, 47 Barb. 413. All the requirements of the statute must be strictly complied with. *Broderick v. Smith*, 3 Lans. 26. Contingent liabilities may be presented. *Hoyt v. Bonnett*, 50 N. Y. 538. The claim may be presented to an executor by letter or any other way which deals fairly with him and the interests which he represents, and the creditor is not bound to exhibit the evidence of his claim or make oath of the justice thereof, unless required to do so by the executor. *Gansevoort v. Nelson*, 6 Hill, 389. And the claim need not be presented to each of two executors. *Genet v. Binsse*, 3 Daly, 239. When the claim has been presented before notice, it need not be repeated. *Johnson v. Corbett*, 11 Paige, 265.

§ 361. *Effect of presenting claims and omitting to present.*

—The fact that a creditor presents his claim to the assignee entitles him to notice of all proceedings of which creditors are entitled to notice, but the claims so presented do not necessarily furnish the basis of distribution of the estate. Before a distribution is ordered, the court may require the creditors to make proof of their claims, and this is generally done under an order of reference on an accounting. See *post*, chap. XXVIII.

A failure to present his claim may, however, prove disastrous to the creditor, for unless his claim is presented within the time limited, the creditor need not be served with a citation for a final accounting of the assignee, and thus he may fail to obtain notice in time to share in the distribution; but he may appear on the accounting, and present his claim then, notwithstanding he has failed to present his claim to the assignee within the required time. Laws of 1877, chap. 466, §§ 13, 19; *post*, chap. XXVIII.

§ 362. *Trial of disputed claims.*—The general assignment act also provides for the trial of disputed claims against the estate as follows:

“The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this act, or the acts hereby amended. It may, in its discretion, award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this act.” Laws of 1877, chap. 446, § 26; as amended by Laws of 1878, chap. 318, § 7.

This section is supplemental to the twentieth section of the same act, by which it is provided that, in a proceeding for an accounting, the county court shall have power “to settle and adjudicate upon the account and the claims presented.” It appears to be the object of the section first cited to permit the court to direct a trial before the court, or before a referee, of a disputed claim before the accounting, when its determination on the accounting would occasion delay, or when the nature of the claim is such that it should properly be presented to a jury.

§ 363. *Trustees of insolvent debtors appointed under Revised Statutes ; Notice.*—“ The trustees, immediately upon their appointment, shall give notice thereof, and therein shall require :

“ 1. All persons indebted to such debtor, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them, respectively, to such trustees, and to pay the same.

“ 2. All persons having in their possession any property or effects of such debtor to deliver the same to the said trustees by the day so appointed.

“ 3. All the creditors to deliver their respective accounts and demands to the trustees, or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.” 2 R. S. 43, § 8 ; 3 R. S. 6th ed. 38, § 10.

“ In the case of an insolvent or imprisoned debtor, such notice shall be published for at least three weeks in a newspaper printed in the county where application was made, and in the case of non-resident, absconding or concealed debtors, it shall be published for the same time in the newspapers in which the notice of an attachment having issued is directed to be printed.” 2 R. S. 43, § 9 ; 3 R. S. 6th ed. 38, § 11.

CHAPTER XXVIII.

ACCOUNTING.

§ 364. *In general.*—The proceedings of the parties upon an accounting under a general assignment, are, to a certain extent, prescribed by the general assignment act of 1877, and jurisdiction is by that act conferred upon the county judge, including the judges of the court of common pleas, to entertain proceedings under that statute, but the jurisdiction conferred by that act is not exclusive (*ante*, § 269), and a court of equity still has jurisdiction of the trust under a general assignment, and of proceedings for an accounting either by or against an assignee. Moreover, the general assignment act has not attempted to detail the practice on an accounting, except so far as it prescribes the manner of bringing the parties before the court, and the powers which may be exercised by the county court in such matters. The method in which the powers so conferred are to be practically applied is to be determined by analogous proceedings in an action for accounting. For these reasons an outline of the proceedings on an action for an accounting will not be out of place in this connection. To this we shall now proceed, and shall afterwards consider the special statutory proceedings under the general assignment act relating to accountings, and shall then take up by themselves the provisions of the Revised Statutes relating to trustees of insolvent debtors.

§ 365. *Jurisdiction of the subject-matter.*—A court of equity has inherent jurisdiction of all matters of account. *Ludlow v. Simond*, 2 Caines' Cas. 1; *Post v. Kimberly*, 9 Paige, 470, 493; *Christy v. Libby*, 2 Daly, 418; *Rathbone v. Warren*, 10 Johns. 587, 595; *Duncan v. Lyon*, 3 Johns. Ch. 361. The Supreme Court, as the successor of the court of chancery, has general jurisdiction of the subject, and this jurisdiction has been extended by statute to all the superior city.

courts. *Christy v. Libby*, 2 Daly, 418; s. c. 5 Abb. Pr. N. S. 346. But, as has just been stated, the county court under the general assignment act, has also jurisdiction to compel an assignee to account. In like manner a concurrent jurisdiction to compel an executor or administrator to account, exists in a court of equity, and also in the surrogate's court, under the Revised Statutes.

The rules applicable to the question of jurisdiction in the one case appear to be equally applicable in the other. In reference to executors and administrators, it is said that inasmuch as the statutory method is in most cases adequate and less formal and expensive, a court of equity may decline to exercise its jurisdiction. *Redfield Sur. Pr.* 356. But in many cases resort to a court of equity is necessary or desirable, and in such cases it will not hesitate to exercise its authority. *Wood v. Brown*, 34 N. Y. 347; *Day v. Stone*, 15 Abb. Pr. N. S. 137; *Christy v. Libby*, 5 Abb. Pr. N. S. 192; s. c. 2 Daly, 418. But where the parties have been brought before the surrogate to account, a court of equity will not, without some special and satisfactory reason, interfere with the proceeding, or sustain a bill for general relief. *Seymour v. Seymour*, 4 Johns. Ch. 409. These principles apply equally to the concurrent jurisdiction of a court of equity and the county court in reference to general assignees.

§ 366. *Proceedings by different creditors.*—The filing of a bill by one creditor, in behalf of himself and others, will not prevent another creditor from filing a similar bill previous to a decree in the first suit. But as soon as a decree is obtained in either suit, for the benefit of all the creditors, the proceedings “in all the other suits may be stayed, if no further relief could be obtained under the other suits.” *Inness v. Lansing*, 7 Paige, 583; *Rogers v. King*, 8 Paige, 209. So when an executor or trustee holds a fund subject to the control of the court, and there is a decree that he account, although that decree be not the final decree in the cause, it has such effect that all having any claim on the fund may come in and prove their claims, however they may be founded; and no other action will be allowed. *Groshon v. Lyon*, 16 Barb. 461. This principle has been applied to ac-

countings under general assignments. Where different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the first suit brought, or wherein interlocutory judgment is first obtained, and to stay all proceedings in the other actions. *Travis v. Myers*, 67 N. Y. 542.

§ 367. *Parties to an action for account.*—An action to compel an accounting and distribution of the trust fund may be instituted by any creditor provided for in the assignment, whether he be a judgment creditor or not (*Goncelier v. Foret*, 4 Minn. 13; and see *Matter of Farnum*, 21 Supm. Ct. [13 Hun], 159); or by the assignor (*Armstrong v. Byrne*, 1 Edw. Ch. 79); or the assignee may himself bring an action for the settlement of his accounts and a distribution. *Ludlow v. Simond*, 2 Caines Cas. 1, 39, 52; 1 VanSant. Eq. Pr. 161. In an action for an accounting, all persons interested in obtaining the account must be parties. All the creditors, therefore, are necessary parties. *Egberts v. Wood*, 3 Paige, 517; *Wakeman v. Grover*, 4 Id. 23; *Brooks v. Peck*, 38 Barb. 519; *Petrie v. Petrie*, 7 Lans. 90; *McKenzie v. L'Amoureux*, 11 Barb. 516; *Garner v. Wright*, 28 How. Pr. 92. The assignors and all the assignees must be parties. *Perry on Trust*, 2d ed. § 876. And if one of the assignees be dead, it is proper, and in some instances necessary, that his representatives be made parties. *Haines v. Hollister*, 64 N. Y. 1; *King v. Talbot*, 40 N. Y. 76; *Sortore v. Scott*, 6 Lans. 271; see *In re Grove*, 64 Barb. 526. But it is not necessary that all the creditors be named as parties on the record. The Code of Civil Procedure (§ 448) provides that “where the question is one of common or general interest of many persons; or where the persons who may be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” In such a case the action may be brought by one of the creditors in behalf of himself and all other creditors similarly situated. *Petree v. Lansing*, 66 Barb. 357; *Kerr v. Blodgett*, 48 N. Y. 62; *Brooks v. Peck*, 38 Barb. 519; *Brooks v. Gibbons*, 4 Paige, 374; *Wakeman v. Grover*, 4 Id. 23.

And an action may be maintained by a preferred creditor in behalf of himself and other creditors, for an accounting, since the rights of preferred creditors under an assignment are not antagonistic to rights of other creditors claiming under the same instrument, so as to render it improper for the preferred creditor to maintain an action as representative of all the creditors. *Brooks v. Peck*, 38 Barb. 519.

§ 368. *Complaint.*—The proper averments of a complaint in an action instituted by a creditor, in behalf of himself and all other creditors, to compel an accounting by an assignee under a general assignment, and a distribution of the estate, are: (1) The execution of the assignment by the assignor; (2) The acceptance and entry upon the discharge of his duties and the receipt of the assigned property by the assignee; (3) The fact (if it be so) that the inventory and schedules have been filed, and that the assignee has qualified by giving the bond required by the statute; (4) The facts showing that the plaintiff is interested in the trust property, to wit, a cause of action for an indebtedness of the assignor provided for in the assignment; (5) That the assignee has not accounted or paid the plaintiff's proportionate share under the assignment.

When the object of the action is also to remove or restrain the assignee on the ground of misconduct, the complaint must set out the specific charges of misconduct upon which the plaintiff relies. 2 Van Sant. Eq. Pl. 175, *et seq.*

§ 369. *Defences.*—Where a suit is brought by creditors to enforce the trust against an assignee who has received the property of the debtor, he cannot set up the defence of fraud in making and receiving the transfer for the benefit of such creditors without showing that the fund has been recovered from him by the parties intended to be defrauded. *Seaman v. Stoughton*, 3 Barb. Ch. 344.

Where another action is pending to effect the same accounting, that will be a bar to the suit, but the objection must be taken in the answer. *Hertell v. Van Buren*, 3 Edw. Ch. 21; *Weed v. Small*, 7 Paige, 573; *Christy v. Libby*, 2 Daly, 418; see *ante*, § 366.

And where there has been a full and final adjustment by the parties, that will be a bar to a subsequent action for an account, unless there be fraud or error distinctly specified and proved. *McIntyre v. Warren*, 3 Abb. Dec. 99; s. c. 3 Keyes, 185; *Lockwood v. Thorne*, 11 N. Y. 1; *Chubbuck v. Vernam*, 42 N. Y. 432; *Bruen v. Hone*, 2 Barb. 586.

As a general rule of equity, an assignee in trust cannot set up the statute of limitations against his *cestui que trust*. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time, and its inability to do complete justice. Story's Eq. § 1520a.

In accordance with the principle thus laid down, it has been frequently held that a long delay would defeat the right to an accounting. *Kingsland v. Roberts*, 2 Paige, 193; *Ellison v. Moffatt*, 1 Johns. Ch. 46; *Mooers v. White*, 6 Id. 360; *Raynor v. Pearsall*, 3 Id. 578; *Ray v. Bogert*, 2 Id. 432; *Phillips v. Prevost*, 4 Id. 205; and see *Lyon v. Chase*, 51 Barb. 13.

By statute in this State, it is provided that "where the purposes for which an express trust shall have been created shall have ceased, the estate of the trustee shall also cease; and where an estate has been conveyed to trustees for the benefit of creditors, and no different limitation is contained in the instrument creating the trust, such trust shall be deemed discharged at the end of twenty-five years from the creation of the same, and the estate conveyed to trustee or trustees, and not granted or conveyed by him or them, shall revert to the grantor or grantors, his or their heirs or devisees, or persons claiming under them, to the same effect as though such trust had not been created." Laws, 1875, ch. 545; 2 R. S. 6th ed. 1110, § 80; and see *Morrison v. Brand*, 5 Daly, 40.

§ 370. *Order of reference.*—If defences are interposed, the issues must be brought to trial; and if the issue is made upon the question whether the assignee should be required to account, that question must be first determined. *Mitchell v. Stewart*, 3 Abb. Pr. N. S. 250. If the assignee admits his liability to account, or it be determined that he should account, or if no defence is interposed, the long established practice is to send the matter to a referee to take and state the account, and to take proof of such other matters as the court may require, in order to render final judgment; and this is likewise the practice under the Code. Code of Civ. Pro. § 1015; *Palmer v. Palmer*, 13 How. Pr. 363; *Ketchum v. Clark*, 22 Barb. 319.

The order of reference should specify the duties of the referee. These are, in general, to take and state the assignee's account, and when necessary for the purposes of a final distribution, to ascertain what creditors are entitled to share in the distribution, and in what amounts or proportions. When the action is brought by a creditor for the collective benefit of all the creditors, the Code provides for the publication of a notice to creditors to come in and exhibit their claims before the referee (Code of Civ. Pro. § 796; *post*, § 372). The order of reference in such case should contain a direction for the publication of such notice, together with the designation of the paper in which it is to be published in addition to the State paper. In addition to these matters, the order should specify the principles upon which the account is to be taken (*Remsen v. Remsen*, 2 Johns. Ch. 294); should direct the referee to make all just allowances to the assignee, together with his commissions, and should direct him to produce before the referee all books and writings relating to the estate. It is the better practice, also, for the order of reference to specify the time and place of the first hearing and what notice shall be given to parties to appear before the referee.

§ 371. *Notice of hearing.*—All the parties to the action who have appeared are entitled to notice of the hearing. The referee, upon being served with the order of reference, should fix the time and place of hearing, if not specified in the order, and, if required, should issue a summons to the several parties

to attend before him at the time and place so named. But, instead of a summons issued by the referee, the parties may be brought before the referee on notice. *Stephens v. Strong*, 8 How. Pr. 339; *Sage v. Mosher*, 17 How. Pr. 367. When the reference is for the trial of the action, fourteen days' notice must be given. *Mohrman v. Bush*, 9 Supm. Ct. (2 Hun), 674. No express provision is made for notice of hearing in references other than those to hear and determine. It has been said that the ordinary notice was eight days (1 Van Sant. Eq. Pr. 524), unless the referee, by summons, fixes a shorter time. By the rules of the former practice the time fixed could not have been less than two days, when the solicitor of the adverse party resided in the place where the hearing was had; not less than four days when he resided elsewhere not exceeding fifty miles from the place of hearing; nor less than six days if over fifty and not exceeding one hundred miles; and when he resided more than one hundred miles from the place of hearing, not less than eight days, unless a shorter time is fixed in the order of reference. 1 Van Sant. Eq. Pr. 524; 3 Wait's Pr. 351.

§ 372. *Notice to creditors to present claims.*—When the order of reference directs the referee to ascertain what creditors are entitled to share in the distribution of the estate, and in what amounts, it will also direct him to publish notice of the time and place where such claims are to be presented in accordance with the following provision of the Code of Civil Procedure:

“Where an action is brought for the collective benefit of the creditors of a person or of an estate, or for the benefit of a person or persons other than the plaintiff, who will come in and contribute to the expense of the action, notice of the direction of the court contained in a judgment or order requiring the creditors, or other person or persons, to exhibit their demands, or otherwise to come in, must be published once in each week for at least three successive weeks, and as much longer as the court directs, in the newspaper published at Albany in which legal notices are required to be published, and in a newspaper published in the county where the act is required to be done.” Code of Civ. Pro. § 786.

If a creditor fails to come in and prove his claim after such

notice, he will be barred, although the assignee have knowledge of the claim. *Kerr v. Blodgett*, 48 N. Y. 62. But at any time before final judgment, and even before the distribution of the fund, creditors may be permitted to come in and file their claim. *Wilder v. Keeler*, 3 Paige, 164; *Lashley v. Hogg*, 11 Ves. 602; *Hartwell v. Colvin*, 16 Beav. 140; *Pratt v. Rathbun*, 7 Paige, 269; *Brooks v. Gibbons*, 4 Paige, 374.

After the referee's report has been filed, the proper course for a creditor who has failed to file his claim is by petition, addressed to the court, praying to be permitted to come in and establish his claim. The petition must be supported by the affidavit of the claimant, and must be served on the parties to the cause. 2 Dan. Ch. Pr. 1205. He must also explain the delay. The terms and conditions upon which he will be allowed to come in will, of course, depend upon the circumstances of each particular case, and if it be a proper one the court will make an order referring it back to the referee to make the inquiry. 3 Wait's Pr. 364.

§ 373. *Proceedings before the referee.*—The method of taking and stating an account is still that which prevailed under the practice of the old court of chancery; no other manner of accounting has been adopted by the Code. *Wiggin v. Gans*, 4 Sandf. 646; *Fraser v. Phelps*, 4 Id. 682; *Ketchum v. Clark*, 22 Barb. 319; *Palmer v. Palmer*, 13 How. Pr. 363; *Brevoort v. Warner*, 8 Id. 321.

The practice will be found detailed in Daniels' Ch. Pr. 1221; 1 Barb. Ch. Pr. 505; 1 Van Sant. Eq. Pr. 531; 5 Wait's Pr. 662.

The proceedings in the reference are regulated by the 107th Chancery rule.¹

¹ The 107th rule of the Court of Chancery, as adopted in 1829, was in these words: "All parties accounting before a master shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the master shall direct." In the revision of the rules, in 1837, the following was added to the 107th rule, viz.: "On any reference to take or state an account, the master shall be at liberty to allow interest as shall be just and equitable, without any special directions for that purpose, unless a contrary direction is contained in the order of reference. And every

§ 374. *Form of the account.*—The rule of chancery referred to (*ante*, § 373) required the parties to bring in their accounts in the form of debtor and creditor, verified by affidavit that the account, including both debits and credits, is correct, and that the party accounting does not know of any error or omission therein to the prejudice of any of the other parties. *Story v. Brown*, 4 Paige, 112; *Wiggins v. Gans*, 4 Sandf. 646.

The inventory and schedules made and filed as required by the statute constitute a convenient, if not a necessary basis for preparing the account. In the case of administrators and executors, the inventory of the estate furnishes presumptive evidence of the amount and value of the property coming into their hands. *Hasbrouck v. Hasbrouck*, 27 N. Y. 182; rev'g 37 Barb. 579.

In the case of a general assignee, if the inventory was made by the assignor being regarded as a part of the assignment (*Terry v. Butler*, 43 Barb. 395) accepted by him, it would furnish at least presumptive evidence of the property which he had received. If, on the other hand, the inventory was made by the assignee, it would constitute an admission of liability on his part for the property enumerated in it.

Following, then, the rules applicable to executors and administrators, so far as they apply, the assignee, in making up his account, should charge himself with the property contained in the inventory at the values there given.¹ He is then to

charge, discharge or state of facts brought in before a master shall be verified by oath as true, either positively or upon information and belief." The rule continued in this form until the Court of Chancery was abolished. *Wiggins v. Gans*, 4 Sandf. 649, note.

¹ In *Wilcox v. Smith* (26 Barb. 316, 346) Mr. Justice Balcom made the following statement of the form in which the accounts of executors and administrators should be prepared, which is serviceable in the preparation of an assignee's account:

"Executors and administrators, in making up their accounts, are first to charge themselves with the amount of the property of the deceased, contained in the inventory, at the appraised value. (Kirtland's Surrogate, 197, 392.) They are then to make themselves debtor for the increase to the same, such as interest that has accrued on debts owing to the deceased, and property and demands which have been discovered subsequent to the taking of the inventory. Next, sums for which they have sold property exceeding its appraised value, and then all other increase to the inventory and the items thereof. The whole increase being added to the value of the property as shown by the inventory, constitutes

charge himself with any property belonging to the estate which has come into his hands not included in the inventory; next, with any increase to the estate, either by way of interest on overdue claims, or by sales of property at more than the inventoried value. These items constitute the debtor side of the account. *Wilcox v. Smith, supra*; *Matter of Jones*, 1 Redf. 263. He may then credit himself with the amount of uncollected claims; next, for the difference between the inventoried value and the actual amount received on a sale of property when the property has been sold for less than its inventoried value. Third, for property, if any, which has been lost, or which was included in the inventory but was not delivered to him, and which he was unable to obtain. Fourth, for actual expenses and disbursements made in the administration of the estate; and, Fifth, for any sums paid to creditors under the assignment and dividends rendered.

This form of account is suggested as convenient, and as following that rendered by executors and administrators, but it has nowhere been judicially determined that the account must be rendered in this or in any other specified form, except that it must be brought in the form of debtor and creditor (*ante*, § 373).

the debtor side of their accounts. The credit side of their accounts consists, First, of debts marked bad or doubtful, which have not been paid to them at the amounts thereof set down in the inventory. Secondly, of sums for which they have necessarily sold property at less prices than its appraised value, with a list of the articles sold. Thirdly, the articles of property lost without their fault, and the cause of such loss, with the appraised value of such articles. Fourthly, the particular debts appraised as good which they have been unable to collect by the exercise of ordinary diligence, and the reasons why they could not collect them, with the amounts of such debts, as noted in the inventory. Fifthly, the debts paid by them, to whom paid, and when, and the amounts thereof. Sixthly, the items of their actual and necessary expenses paid in the execution of the trusts reposed in them. The sum total of such credits is then to be subtracted from the amount of the debtor side of their accounts. Following the remainder, the articles of property yet unsold are to be mentioned, with the appraised value, and also the reasons why they have not sold the same. And afterwards they are to set forth all other facts which are pertinent and proper to be considered by the surrogate in making up his decree. It is not necessary that the accounts of executors and administrators should in all cases be made out in the manner above stated, but such method ought to be substantially adopted."

§ 375. *Verification.*—The account must be verified. The substance of the verification is that the account, according to the best of the knowledge, information and belief of the assignee, contains a full and true account of all his receipts and disbursements on account of the estate, and of all sums of money belonging to the estate which have come into his hands, or which have been received by any other person by his order or authority for his use, and that he does not know of any error or omission in the account to the prejudice of any of the parties interested in the estate. *Gardner v. Gardner*, 7 Paige, 112, 114.

If there is any item of the account for disbursements not exceeding twenty dollars, for which the assignee produces no voucher, he must either, in the affidavit annexed to the account, or on the hearing, make oath to these items, to whom paid, for what and when, and he must swear positively to the fact and not as to belief only, and the whole of the items so established must not exceed the sum of five hundred dollars. If so verified the items will be presumptively proven. *Remsen v. Remsen*, 2 Johns. Ch. 494; *Kellett v. Rathbun*, 4 Paige, 103; *Williams v. Purdy*, 6 Id. 166; *Gardner v. Gardner*, 7 Id. 114; *Westervelt v. Gregg*, 1 Barb. Ch. 469.

§ 376. *Examination of the account.*—If any party is dissatisfied with the account so brought in the ancient practice, was to file written interrogatories for the examination of a party to which he put in his answers in writing (Daniels' Chan. Pr. 1223; 1 Barb. Ch. 507), the modern practice is to examine both parties and witnesses orally before the referee. *Benson v. Le Roy*, 1 Paige, 122. Chan. Kent lays down the practice before the referee as follows (*Remsen v. Remsen*, 2 Johns. Ch. 494): "The referee ought, in the first instance, to ascertain from the parties or their counsel, by suitable acknowledgments, what matters or things are agreed to or admitted, and then as a general rule and for the sake of precision, the disputed items claimed by either party, ought to be reduced to writing by the parties, and the requisite proofs ought then to be taken." Mr. Surrogate Bradford states substantially the same practice. He says:

"The proper practice is to state the objections in the form

of distinct and specific allegations and give proof thereof. Such allegations may, of course, cover every possible ground of objection, such as a want of proper vouchers, or that payments have been made or debts entered which are not properly to be charged against the estate, or that fraudulent charges have been made or that assets not included in the inventory, have come into the hands of the administrator." *Metzger v. Metzger*, 1 Bradf. 265.

A party may be charged with costs who makes objections which, upon subsequent investigation of the accounts, it is found he had no reasonable or probable ground for making. *Gardner v. Gardner*, 7 Paige, 112, 115.

A party is not precluded by the objections first made to the account, as it frequently is discovered in the course of the investigation, that charges have been improperly inserted in the account, or credits to the estate have been omitted which the adverse party had no means of knowing at the time the account was first presented. *Gardner v. Gardner*, *supra*.

The account is said to be *surcharged* for omissions for which credit ought to have been given or *falsified* for wrong debits. *Metzger v. Metzger*, 1 Bradf. 265, 267.

The assignee may now be called and give evidence on his own behalf, although the rule was formerly otherwise. *Benson v. Le Roy*, 1 Paige, 122; see *Wiggin v. Gans*, 4 Sandf. 646; 3 Wait's Prac. 358.

In all cases where the referee is directed to take the proofs, the depositions of the witnesses should be reduced to writing by the referee, and subscribed by the witnesses, and the depositions returned with the report to the court. *Remsen v. Remsen*, 2 Johns. Ch. 494; Rules 30, Sup. Ct.

§ 377. *Vouchers*.—The established rule of practice on accountings in equity requires that the account should be sustained by vouchers whenever the payment exceeds, in England, forty shillings, in this country twenty dollars. *Remsen v. Remsen*, 2 Johns. Ch. 494, 501. This rule has been embodied in the statute in reference to accounts by executors and administrators (2 R. S. 92, § 55), and has been frequently applied. *Wilcox v. Smith*, 26 Barb. 342; *Kellett v. Rathbun*, 4 Paige, 102; *Gardner v. Gardner*, 7 Id. 112.

What constitutes a proper voucher is for the judge to decide, but it seems that all the assignee can be required to do is to produce his receipts to vouch his payments, and where any party in interest doubts their genuineness, he may proceed to impeach them. Bennett's Master's Pract. 21 Law Lib. 85; *Metzger v. Metzger*, 1 Bradf. 265, 267.

There are cases in which a party has been permitted to discharge himself by other means than the ordinary vouchers. Thus, where an account is of long standing, the court will sometimes permit the accounting party to discharge himself upon oath of all such matters as he cannot prove by vouchers by reason of their loss. 1 Barb. Ch. Pr. 501, 502; see *Wilcox v. Smith*, 26 Barb. 316, 342.

§ 378. *Allowances to assignee.*—In taking any account directed by a decretal order, the referee is empowered to allow the parties such disbursements as may appear to have been fairly and properly made by them. But the assignee must specify the items of such expenses and disbursements. A party on accounting, will not be allowed anything under the head of general expenses without specifying the particulars. *Meth. Epis. Ch. v. Jaques*, 3 Johns. Ch. 77, 116.

“While the assignee, as trustee for the benefit of creditors, is entitled to indemnity and reimbursement, out of the assigned estate, for all *necessary* expenses incurred by him in the execution of his trust, his right to incumber the trust estate or in involve it in the expense of litigations and the employment of professional advisers, or other expenses, is limited to such cases as reasonably call for professional advice, or the incurring of the expense which ‘*one of ordinary prudence and caution would undertake in the management of his own affairs.*’” Robinson, J., in *Levy's Accounting*, 1 Abb. N. C. 177.

Necessary expenses for clerk hire and office rent will be allowed. *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Duffy v. Dunean*, 35 N. Y. 187. But a trustee cannot charge, in addition to his commissions, for services rendered by himself to the estate. Thus, if he be an attorney, he cannot recover of the estate for professional services rendered, however beneficial. *Green v. Winter*, 1 Johns. Ch. 26; *Vanderheyden v. Vander-*

heyden, 2 Paige, 287; *Collier v. Munn*, 41 N. Y. 143; *Nichols v. McEwen*, 21 N. Y. 22. But an assignee will be allowed for all such expenses as he incurs in taking possession of and caring for the trust property, and in its collection and sale, and will be allowed proper fees of counsel for services in suits, and for advice in the management of the trust. *Noyes v. Blakeman*, 3 Sandf. 531; *Jewett v. Woodward*, 1 Edw. Ch. 195; see also *In re Noyes*, 6 N. B. R. 277; *In re Davenport*, 3 Id. 77; *In re Tully*, Id. 82; *In re Warshing*, 5 Id. 350. And this applies to responsibilities which they have properly incurred as well as to actual disbursements. *Matter of Bunch*, 12 Wend. 280. But when the assignee makes a charge against the estate, he must prove that the estate was in some manner benefited by such payment, before the payment becomes a proper credit to the assignee. *Duffy v. Duncan*, 35 N. Y. 187.

§ 379. *Commissions*.—The amendment of 1878 (Laws of 1878, ch. 318, § 7), to the general assignment act provides that “the assignee or assignees named in any assignment, shall receive for his or their services a commission of five per cent. on the whole sum which will have come into his or their hands.”

Previous to the statute it was held that where no rate of compensation was fixed in the assignment itself, or the direction was to pay reasonable counsel fees, the assignee would be compensated at the rate allowed to executors and administrators. *Meachem v. Sternes*, 9 Paige, 398; *Duffy v. Duncan*, 35 N. Y. 187; see *Matter of Schell*, 53 N. Y. 263; *Keteltas v. Wilson*, 36 Barb. 298. Though in *Duffy v. Duncan* (*supra*), it was intimated that the rate of compensation allowed to the trustees of insolvent debtors under the Revised Statutes would furnish a proper limit, and in the *Matter of Schell* (*supra*), the court fixed the value of the services of a trustee on a *quantum meruit*. But it seems that the assignor may, on the assignment itself, fix any rate of compensation he sees fit, subject to the limitation that if it be excessive and indicate an intent to defraud creditors, it will render the assignment fraudulent and void as against creditors. See *Wynkoop v. Shardlow*, 44 Barb. 84; *Campbell v. Woodworth*, 24 N. Y. 304; *Eyre v. Beebe*, 28 How. Pr. 333.

§ 380. *Referee's report.*—The referee's report must conform to the order of reference. If he is directed to take and state the account of the assignee, it will ordinarily be convenient to report the account as filed, annexing it as a schedule, and then if any items have been disallowed, or if the assignee has been charged with any items not contained in the account, to specify them, and annex as a separate schedule the account as finally allowed. If the referee is also directed to ascertain and report the creditors and the amounts in which they are entitled to share in the estate, the referee should report and annex proof of publication of notice as required by the order, and should report the claims presented to him, separately, and his findings in reference to each claim, and if he is authorized to adjudicate upon disputed claims, he must also present his findings of fact and law upon each of such claims. He must also find such facts as he is directed to find for the information of the court (Code of Civ. Pro. § 1015), and the testimony taken by him and signed by the witnesses must be filed with the report. Rule 30, *post*, § 381.

The practice in chancery in such cases was for the master to prepare a draft of his report and deliver it to such parties as desired, and for the parties then to come in and file objections to such draft, and after argument thereon the master made his final report. In this report either party who had filed objections could take exceptions based upon such objections. These exceptions could be brought on before the court for argument, and nothing else in the account come up for review or argument. *Ketchum v. Clark*, 22 Barb. 319; *Remsen v. Remsen*, 2 Johns. Ch. 494; *Meth. Epis. Ch. v. Jaques*, 3 Id. 77. But it has been said that the former practice of carrying in objections to the draft of the master's (referee's) report is abolished. It is enough if the objections be taken on the hearing, and entered by the referee on his minutes as in a case of trial before him, and after notice of filing the report, specific exceptions be filed and served within the eight days, and substantially in the form of the chancery practice. 1 Van Sant. Eq. Pr. 568; 3 Wait's Pr. 386; *Evertson v. Givan*, 16 How. Pr. 25.

It does not seem to be necessary, therefore, that requests to

find should be presented to the referee, either orally or in writing. *Evertson v. Givan*, 16 How. Pr. 25. Although under § 1023 of the Code of Civ. Pro. it may be proper for a party who desires to do so to present such requests to the referee.

§ 381. *Exceptions to the report.*—By the 30th rule of court, it is provided: “In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book under the title of the cause or proceeding, and the said report shall become absolute and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein.”

This rule applies to reports of referees on passing accounts. *Matter of Guardian Savings Bank*, 16 Supm. Ct. (9 Hun), 267.

Creditors who have established their claims before the referee, are also permitted to except to the report, although not parties to the suit. *Wilson v. Wilson*, 2 Molloy, 328. So also are creditors who have preferred claims which have been rejected by the referee. It is necessary, however, before they do so, to first obtain permission of the court, which they may do upon motion of course. 2 Dan. Ch. Pr. 1311.

If a party neglect to except to a referee's report for eight days after notice of its filing, it becomes absolute under rule 30, although it is defective on its face. *Catlin v. Catlin*, 9 Supm. Ct. (2 Hun), 378.

Forms of exceptions to a referee's report on taking an assignee's account, will be found in a note to Levy's Accounting (1 Abb. N. C. 177).

§ 382. *Final hearing and decree.*—If exceptions are filed and served within the time limited, they may be brought to hearing at any special term thereafter, on the notice of any party inter-

rested therein. Rule 30, *ante*, § 381. This may be done in the form of a motion to confirm the report. But the motion should be made at special term and not at chambers. *Empire B. & M. L. As. v. Stevens*, 15 Supm. Ct. (8 Hun), 515. The cause is usually placed regularly on the calendar, the date of issue being the date of the original trial issue. *Gregory v. Campbell*, 16 How. Pr. 417. The cause then proceeds to hearing upon the exceptions and proof reported by the referee. If the exceptions are overruled, the report is confirmed, and judgment is entered accordingly. 3 Wait's Pr. 390. If the exceptions, or any part of them, are sustained, the case may or may not be sent back to the referee, dependent upon whether further testimony is necessary to enable the court to render judgment. Where, after default, a reference was ordered to take and state an account, with leave to either party to apply to the court for a confirmation of the report, and the referee made his report in accordance with the order, to which the defendant excepted, and, on motion of the plaintiff, the exceptions were overruled, and judgment entered, from which the defendant appealed, without taking an appeal from the order overruling the exceptions, it was held that the appeal from the judgment brought up the question whether the facts reported were sufficient to sustain the judgment, and upon a case and exceptions, errors of law on the part of the referee might be reviewed. *Darling v. Brewster*, 55 N. Y. 667; *Kirby v. Fitzpatrick*, 18 N. Y. 484; s. c. 31 Id. 417; *Marshall v. Smith*, 20 Id. 251.

•§ 383. *Proceedings for accounting under the general assignment act.*—Thus far the proceedings in an action for an accounting in equity have been given in outline. These will be found serviceable in considering further the statutory proceedings for an accounting prescribed by the general assignment act. That act provides as follows :

“A citation may be issued to all parties, interested in the estate assigned, as creditors or otherwise, requiring them to appear in court on some day therein to be specified, and to show cause why a settlement of the account of proceeding of the assignee should not be had, and if no cause be shown, to attend

the settlement of such account. The county court must issue all citations mentioned in this act which must be returnable in court. It may issue a citation on the petition of an assignee, at any time after the assignment or on petition of a creditor, or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided." Laws of 1877, ch. 466, § 11; as am'd by Laws of 1878, ch. 318. See Laws of 1860, ch. 348; Laws of 1867, ch. 860; Laws of 1870, ch. 92; Laws of 1872, ch. 838; Laws of 1875, ch. 56. Compare similar provision in reference to executors and administrators, 2 R. S. 92, §§ 52, 60, 70; 3 R. S. 6th ed. 99, §§ 63, 73, 85.

"A citation issued on the petition of a creditor may be addressed to and served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested." Laws of 1877, ch. 466, § 12.

Under the statute, as it stood previous to the act of 1877, a creditor might apply, after the lapse of a year, for a summons or citation compelling the assignee to appear and show cause why an account of the trust fund should not be made and why payment of such creditor's just proportionate part of such fund should not be ordered. Under this provision there appeared to be no method for compelling a final accounting and distribution of the estate among all the parties interested, and the judges were unwilling to make partial distributions of the estate to petitioning creditors without notice to all who were interested in the estate. *In re Nelson*, 11 Abb. Pr. 352. In practice, therefore, unless the assignee himself applied upon the return of the summons issued to him for a final settlement of the estate there was no method by which the court could proceed to a final determination of the interests of all the parties.

The act of 1877 provided that "the county judge may issue a citation requiring the parties to show why an accounting and settlement should not be had on petition of an assignee at any time after the assignment or on petition of a creditor or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment or on his own motion, on the removal of an assignee as hereinbefore provided."

Under this section, taken in connection with the 12th section cited above, there still appeared to be some doubt whether it was the intention of the statute that there should be a final accounting on notice to all parties on the petition of a creditor merely. Whatever uncertainty existed has been removed by the amendment of 1878, and there can now be no question but that an accounting in which all persons interested in the estate may be made parties, and in which a final settlement of the assignee's accounts can be had, may be obtained upon the petition of any of the parties mentioned in the section.

The citation issued on the petition of a creditor, may still be served upon the assignee alone, and the court has power to proceed upon such a partial accounting, and to decree payment of any creditor's just proportioned part of the fund or so much thereof as the circumstances of the case render just and proper (*post*, § 390), but it is believed that unless special reason be shown why a final accounting cannot be had, and why an immediate accounting is necessary for the safety of the estate, the court will not burden the estate with the expense of a partial accounting, and that it will not direct the payment of any creditor's proportion of the estate until all parties interested have been heard. Upon the return of a citation addressed to the assignee alone, he may apply for and obtain a general citation issued to all the parties interested (*supra*).

§ 384. *The petition.*—The proceeding is based upon a petition. The petition should set out the execution of the assignment, the fact that the assignee has entered upon the execution of the trust and taken possession of the assigned property. It should state when and where the assignment was recorded, when and where the inventory schedules and bond were filed. If the petitioner be not the assignee, it should also show that more than a year has elapsed since the date of the assignment. It should also show that the assignee has not accounted, and that a demand has been made upon him to do so. It should be verified by the petitioner.

If the assignee be the petitioner, he should also set out the fact that he has been authorized to advertise for claims to be presented to him, and should show a compliance with the order

so authorizing him to advertise, and he should also state the names of the persons by whom claims have been presented.

§ 385. *Who may petition.*—The assignee may bring his petition at any time after the assignment, and a creditor or assignee's surety, or an assignor, at any time after the lapse of one year from the date of the assignment, or an accounting may be ordered by the court when the assignee has been removed.

No judgment is rendered necessary to warrant the proceeding on the part of a creditor (Daniels, J., *People v. Chalmers*, 8 Supm. Ct. [1 Hun], 683, 687); all that is necessary is that the creditor should be entitled to a proportional part of the trust fund provided by the assignment for his benefit (*People v. Chalmers, supra*); and if he verifies his claim, that will be enough to warrant the inquiry. The validity of the petitioner's claim can be determined on the accounting. *Matter of Farnum*, 21 Supm. Ct. (14 Hun), 159.

Where creditors entitled to share in a general assignment have become bound by the terms of a composition in bankruptcy, their right to proceed against the assignee for an accounting, is suspended to await the completion or failure of the composition. *Matter of Backer*, 2 Abb. New Cas. 379; see *Matter of Horsfall*, Daily Reg. Aug. 27, 1878; also s. c. July 9, 1878.

§ 386. *When an account will not be ordered.*—It is in the discretion of the judge to refuse an application by a single creditor to compel an assignee to account under the statute. When proceedings are pending to test the validity of the assignment, and also to seek to obtain the trust property by an assignee in bankruptcy, and there is no collusion, the accounting should be postponed until a definite result is reached. *Matter of Bowery National Bank*, 1 Abb. New Cas. 404.

So when the assignor has been adjudged bankrupt, and his assignee in bankruptcy has brought suit to set aside the general assignment, in which suit a receiver has been appointed and an injunction issued restraining the State assignee from interfering with or disposing of the property, the assignee will not be compelled to account in the State court. *Matter of Ransom*, Daily

Reg. July 20, 1878. But it is no answer on the part of an assignee called upon to account, that he has not qualified by giving the bond required by statute. *Matter of Farnum*, 21 Supm. Ct. (13 Hun), 159.

§ 387. *Citation*.—The petition having been duly presented, the court will thereupon make an order that a citation issue to all the parties interested in the estate assigned, requiring them to appear in court on some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The citation must be issued by the court, and made returnable in court.

The citation issues upon the order and is in the general form of a citation in use in the surrogate's court. It is attested by the judge and signed by the clerk, under the seal of the court. It need not be and usually is not addressed to the persons to be served individually, but is addressed in general terms to all persons interested in the trust estate created by the general assignment described by the names of the parties and the date of its execution.

§ 388. *Who must be served*.—If the accounting is to be general and final, the citation must be served upon "all parties other than the petitioner who are interested in the fund, including assignors, assignees, and their sureties, except that if the time limited by due advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served." Laws of 1877, chap. 464, § 13.

If the accounting be but partial the assignee alone need be served.

§ 389. *Service of citation*.—"In case the creditors of such assignor, who have proved their claims, exceed twenty-five in number, then the county judge, upon proof of affidavit that such creditors exceed such number, may by order direct such citation to be served on each creditor who has proved his claim, by depositing a copy of the same, at least thirty days prior to

the return day thereof, in the post office at the place where the assignee or assignees, or either of them, reside, duly inclosed and directed to each of such creditors, at his last known post office address, with the postage prepaid; and by publishing such citation once a week for at least four weeks prior to such return day in one or more newspapers, to be designated by such county judge as most likely to give notice to such creditors." Laws of 1877, chap. 466, § 13; as amended by Laws of 1878, chap. 318, § 4.

"A citation personally served within the county of the judge or an adjoining county must be so served at least eight days before the return thereof; if in any other county, at least fifteen days before the return thereof." Laws of 1877, chap. 466, § 14.

"The county judge may direct service to be made by publication when he is satisfied by affidavit or verified petition either that the person to be so served is unknown, or that his residence cannot, after diligent inquiry, be ascertained, or that he cannot, after due diligence, be found within the State. The order for such service must direct service of the citation upon such person to be made by publication thereof in one newspaper to be designated by the county judge as most likely to give notice to the person to be served, and also, if it appear that any such person resides without the State, then in the State paper for such length of time as he may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the post office duly inclosed and directed to each person so served, at his last known place of residence or post office address, and the postage paid thereon, at least thirty days before the return day thereof." Laws of 1877, chap. 466, § 15; see Code of Civ. Pro. § 440.

"When publication has been ordered, personal service without the State made if within the United States at least thirty days or without the United States, at least forty days before the return day is equivalent to publication and mailing." Laws of 1877, chap. 466, § 16.

"Personal service upon minors and persons incompetent shall be made in the manner prescribed by law for the service

of citations issued by a surrogate, in cases of final accounting." Laws of 1877, chap. 466, § 17.

"In proceedings of administrators and executors on final settlements of their accounts, minors shall be served with citations and special guardians, appointed in the same manner as citations are required to be served and special guardians appointed on the proof of wills, and in no other way." Laws of 1874, chap. 156. For manner of serving citation on lunatic on proof of will, see Laws of 1872, chap. 693; on infants, 3 R. S. 6th ed. 66, § 55, pl. 3.

"Personal service upon one of two or more creditors who claim as copartners or otherwise as joint creditors shall be equivalent to personal service on all, and voluntary appearance either in person or by attorney shall be equivalent to personal service." Laws of 1877, chap. 466, § 17.

§ 390. *Powers of county court on accounting.*—The twentieth section of the general assignment act provides that :

"On a proceeding for an accounting under this act the county court shall have power (as amended by Laws of 1878, chap. 318):

"1. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith, and to compel their attendance for that purpose and their answers to questions, and the production of books and papers.

"2. To require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account.

"3. To take and state such account, or to appoint a referee to take and state it; and such referee shall have the powers enumerated in subdivision one of this section.

"4. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper.

"5. To discharge the assignee and his surety at any time,

upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement.

“6. On proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly.

“7. To adjourn the proceedings from time to time, issue further citations, if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice.

“8. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this act, or the acts hereby amended, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court, in case of forfeiture, by and for the benefit of the party in whose interest such examination shall be ordered.

“9. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator.” Laws of 1877, chap. 644, § 20; as amended Laws of 1878, chap. 318.

§ 391. *Proceedings on return of citation.*—Upon the return of the citation, proof should be presented to the court of the service of the citation upon all the parties entitled to notice, and if it does not appear by the petition what claims have been presented to the assignee, so as to determine who are entitled to notice; proof of the publication of notice to creditors should also be presented to the court upon the return day.

“On the return of a citation to all parties interested, any person claiming an interest, although not served, may appear and become a party, on duly presenting his claim.” Laws of 1877, chap. 466, § 19.

The assignee may then show cause why he should not proceed to account. There may be, and frequently are circumstances which render it proper that the accounting should be delayed. Some of these are referred to in a previous section (*ante*, § 386).

The estate should be subjected to the expense of but one accounting, if the condition of the estate, or of the claims against it, is such that the whole matter cannot be disposed of until the expiration of further time, it is in the discretion of the court to postpone the accounting.

The assignee may also present any defences to the petition for accounting which would be available to him in an action (*ante*, § 369). If, however, he is prepared to account, or is ordered to do so, he may then file his account, or the proceeding may be adjourned to enable him to do so (*ante*, § 390, para. 7). The statute follows the proceedings for an accounting in the surrogate's court (*ante*, § 390, para. 9). After the account is filed, creditors will be afforded an opportunity to examine it and file their objections. *Van Vleck v. Burroughs*, 6 Barb. 341; *Disoway v. Bank of Washington*, 24 Id. 60. The objections should be reduced to writing, and may cover every possible ground (*ante*, § 376).

It is said (Red. Sur. Pr. 388), that the surrogate may require the executor or administrator to be personally examined on oath before him as to the details of the account, so as to enable a party interested to file objections to specific items, but this course can hardly ever be necessary in view of the practice which generally prevails, of permitting objections to be stated in the most general language. The filing of a notice which either generally or specifically denies the correctness of the account, is sufficient to raise an issue, though unquestionably the surrogate has a discretion to require the objection to be made more definite and specific. Whatever authority the surrogate has in this respect may be exercised by the county judge under the general assignment act (*ante*, § 390, para. 9).

§ 392. *Reference.*—The county court is also empowered to appoint a referee to take and state the account, and the referee may also be authorized to examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions, and the production of books and papers (*ante*, § 390, para. 1 and 3). This power did not exist under the previous act prior to the amendment of 1875. *Matter of Morgan*, 56 N. Y. 629. And subsequent to that act the referee had no power to hear and determine any controverted matter. *Matter of Levy's Accounting*, 1 Abb. N. C. 177.

The order of reference should follow the order ordinarily made in an action for accounting (*ante*, § 370). It should appoint the time and place of the first meeting and the notice to be given. The power to settle and adjudicate upon the claims presented is not one of the powers which can be conferred upon the referee under the first and third paragraphs (*ante*, § 390, para. 1 and 3). That power is lodged in the court by the fourth paragraph (*ante*, § 390, para. 4), but under the 26th section of the act (*ante*, § 362), the court may order a trial before a referee, of any disputed claim or matter arising under the provisions of the act. The referee may, therefore, upon the accounting, be directed to take testimony as to the claims presented and report the same, and the court will pass upon the validity of the claims so presented. *Matter of Farnum*, 21 Supm. Ct. (14 Hun), 159. In case of disputed claims the court may order a trial either before a jury or referee, under the provisions of the 26th section.

§ 393. *Proceedings before the referee.*—The proceedings before the referee upon taking and stating an account are not prescribed by the statute. They are such as have been detailed heretofore in actions for an accounting (*ante*, § 373). The form of the assignee's account (*ante*, § 374), the requirements as to vouchers (*ante*, § 377), the allowances which will be made to the assignee for disbursements, expenses and commissions (*ante*, § 378), the form of the referee's report (*ante*, § 380), and the manner of objecting and excepting to it (*ante*, §§ 380, 381), are

all precisely such as are regulated by law in actions for an accounting, and need not be recapitulated.

§ 394. *Compelling the assignee to account.*—The court may (*ante*, § 390, para. 2) compel the assignee to account in the same manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account. Obedience to such order may be enforced in the manner of compelling the return of an inventory (2 R. S. 92, § 53; 3 R. S. 6th ed. 100, § 66) by attachment and commitment. 2 R. S. 85, § 18; 3 R. S. 6th ed. 92, § 20.

So, also, an executor's letters may be revoked if he abscond or conceal himself so that the order cannot be personally served, or in case of neglect to render an account within thirty days after being committed. Red. Sur. Pr. 371.

But it seems, that without proceeding to compel the assignee to bring in his account, if he refuses to do so the referee may proceed to make up the account, and if sufficient appears from the admissions of the party to be charged in any proceeding in the cause to enable the account against him to be properly made out, the party conducting the proceeding may immediately bring in his charge, without waiting for any account under the rule (*ante*, § 373 n.). 2 Dan. Chan. Pr. 1223; 1 Van Sant. Eq. Pr. 533.

§ 395. *Accounting by trustees of insolvent debtors appointed under the Revised Statutes.*—The assignees of insolvent debtors appointed under the proceedings considered in Parts I and II of this work, are required to keep a regular account of all moneys received by them as trustees, to which every creditor or other person interested therein shall be at liberty, at all reasonable times, to have recourse. 2 R. S. 45, § 26.

It is further provided, that "the trustees within fifteen months from the time of their appointment, shall call a general meeting of the creditors of such debtor by a notice published in the same manner as hereinbefore directed, respecting the publication of the notice of their appointment; in which notice they shall specify the place and time of such meeting, which time shall not be more than three months nor less than two

months after the first publication of such notice. Every notice shall be published at least once in each week until the time of such meeting." 2 R. S. 46, § 27; 3 R. S. 6th ed. 40, § 29; 2 Edm. 47; 1 Fay's Dig. 390. "At such meeting or other adjourned meeting thereafter, all accounts and demands for and against the estate of such debtor shall be fairly adjusted as far as the same can be ascertained, and the amount of moneys in the hands of the trustees declared." 2 R. S. 46, § 29; 3 R. S. 6th ed. 40, § 30; 2 Edm. 47; 1 Fay's Dig. 390.

The method of making distribution will be considered in the succeeding chapter (*post*, chap. XXIX).

"Within ten days after any dividend made by any trustees, they shall render on oath, and file with the clerk of the county court of the county in which they reside, an account in writing of all their proceedings in the premises, stating:

"1st. Their disbursements, commissions and the dividends made by them.

"2d. The names and residences of the creditors to whom dividends were made, and the names of those actually recovering them.

"3d. The property, moneys and effects of the debtor remaining in their hands, and the value and situation of the same. And such trustees may be compelled by a rule of the Supreme Court or of the county court of the county in which they reside, to render such an account on oath on the application of the debtor or of any creditor." 2 R. S. 49, § 45; 3 R. S. 6th ed. 42, § 50; 2 Edm. 50; 1 Fay's Dig. 392.

The trustees are made subject to the order of the Supreme Court and of the county court or court of common pleas of the county in which they were appointed, upon the application of any creditor or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them (*ante*, § 357).

CHAPTER XXIX.

DISTRIBUTION AMONG CREDITORS AND DISCHARGE OF THE ASSIGNEE AND HIS SURETIES.

§ 396. *Who are entitled to share.*—We have heretofore considered to some extent the manner in which the creditors and their claims are to be ascertained (*ante*, § 359). Where the assignment is for the payment of the assignor's debts generally, the persons who are creditors as well as the amounts of their claims may be ascertained on an accounting in equity in the manner hereinbefore pointed out (*ante*, § 372). Under the general assignment act, creditors are required to present their claims with the vouchers to the assignee on notice (*ante*, § 360), and if he doubts the validity of the claims, they may be brought to trial before a jury or referee (*ante*, § 362). The assignee is not required to assume the slightest risk in paying out the trust funds, and if, without the order of the court, he make a payment to a person not authorized by the terms of the trust to receive it, he will be held personally responsible for the misapplication to the persons who can establish a better right, and the advice of counsel will not protect him in making a money payment. *Perry on Trust*, § 927; see *Turner v. Maule*, 3 De G. & S. 497; *Boulton v. Beard*, 3 De G. M. & G. 608; *Knight's Trusts*, 27 Beav. 45. In any case of doubt or uncertainty the assignee should, upon the final accounting, require that the validity of all claims should be settled and determined by the court, and, to that end, that creditors be required to make proof of the validity of their claims.

This may be done, as we have heretofore pointed out, under the provisions of the general assignment act.

Where the trust is for the payment of the grantor's debts generally, it will extend only to debts which existed at the time when the deed was made. A debt subsequently originating is not entitled to payment out of the trust estate. If contingent liabilities are provided for, they must be such as existed when

the conveyance was executed, and should be at least such as would entitle a party, under the provisions of the English bankrupt act or our insolvent laws, to a share in the insolvent or bankrupt estate. *Rome Ex. Bank v. Eames*, 4 Abb. Dec. 83.

And where a note was made the day after the assignment was executed and delivered, it was held that it could not be included in the assignment, nor could the assignor, by antedating the note, vary the effect of the instrument. *Sheldon v. Smith*, 28 Barb. 594, 600; see *Power v. Alger*, 13 Abb. Pr. 284, 475.

§ 397. *Dividends*.—In a proper case, however, dividends may be declared by the assignee before the final accounting. He should be careful to reserve enough to meet all possible claims against the estate which may be brought in on a final accounting (*ante*, § 391).

The assignee should always give notice to the creditors of the payment of any dividend under the assignment, otherwise he will become liable to the payment of interest.

§ 398. *Secured creditors*.—The assignment may provide for the payment of secured claims, and if it be the manifest intent of the assignor that the secured creditor shall be paid on the face of his claim, the creditor's right to payment is fixed by the assignment, and cannot be determined upon any motion of equity or equality, for the court has no power to create or order a new trust. *Midgely v. Slocum*, 2 Abb. N. S. 275, 278. But where the provision is for the payment of debts generally, some question has been made as to whether the creditor is to receive a dividend upon his whole claim or only upon the deficiency after deducting the proceeds or value of the security.

It is undoubtedly a settled rule of equity that where one creditor has two funds of his debtor to which he can resort for payment, and another creditor has a specific or general lien upon one of those funds only for the payment of his debt, equity will compel the first creditor to resort to that fund to which the lien of the other does not extend. *Besley v. Lawrence*, 11 Paige, 581; *Halsey v. Reed*, 9 Paige, 446.

While this rule is not to be doubted, the inquiry still re-

mains whether, after the secured creditor has thus resorted to his security and found it inadequate, the deficiency then remaining or his original debt will constitute the basis of his claim against the remaining fund. The statutory rule in bankruptcy is that he will be admitted as a creditor only for the balance of the debt after deducting the value of the security. R. S. U. S. § 5075. But the security referred to in the bankrupt act is security on the property of the bankrupt, and does not refer to property of third persons, or guarantees or indorsements of third persons. *In re Anderson*, 12 N. B. R. 502; *In re Dunkerson*, 12 Id. 413; *In re Cram*, 1 Id. 504; *In re Brioch*, 15 Id. 11; *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 18 Ves. 65; *Ex parte Goodman*, 3 Mad. Ch. R. 373; *Ex parte Planner*, 1 Atk. 103. And where the creditor holds securities of third persons, he may prove his whole debt against the bankrupt's estate and resort to the security for any deficiency, not receiving, however, more than his claim in full. In case he realizes on the security before proving, he can only prove for the balance remaining unpaid. *Blumenstiel's Bank*, 287.

These rules of the bankrupt law have not been uniformly applied in distributions under general assignments or under State insolvent laws. Thus, in Massachusetts, the rule that the creditor can share only on the deficiency of his debt after exhausting the security is recognized. *Amory v. Francis*, 16 Mass. 308. But the distinction between securities upon the debtor's estate and securities of third persons does not appear to be recognized. *Richardson v. Wyman*, 4 Gray, 553; *Lanckton v. Wolcott*, 6 Met. 305; see *Cabot Bank v. Bodman*, 11 Gray, 134. In Iowa, it has been held, that a creditor could claim a dividend under a general assignment only upon the amount remaining unpaid after exhausting the property upon which he has a special lien. *Wurtz v. Hart*, 13 Iowa, 515. In *Bell v. Fleming's Exrs.* (12 N. J. Eq. 490), the question is left in doubt. In *Putnam v. Russell* (17 Vt. 54), *West v. Bank of Rutland* (19 Id. 403), in insolvency; *Walker v. Barker* (26 Id. 710), *Moses v. Raulet* (2 N. H. 483), *Findlay v. Hosener* (2 Conn. 350), in administration; and *Logan v. Anderson* (18 B. Mon. [Ky.] 114), *Patten's Appeal* (45 Penn. St. 151), *Miller's Appeal* (35 Penn. St. 481), *Morris v. Olwine* (22 Penn. St. 21), *Klein's Appeal*

(27 Id. 42), under general assignments, it was held that the secured creditor was entitled to be paid a dividend on his whole debt, and not merely on the deficiency after applying the security. See also Story's Eq. § 564 *a*.

In this State the question under a general assignment does not appear to have been passed upon except at special term, and the decisions made do not free the matter from doubt. In *Midgeley v. Slocum* (2 Abb. N. S. 275), the assignment directed the assignee "to apply the proceeds towards the payment of the persons or corporations, holders now or at any future time, for the time being," of a specified class of notes. At the date of the assignment the Park National Bank held notes belonging to this class amounting to \$23,500, secured by the pledge of notes of other parties. After the assignment and before the accounting, the bank collected \$16,330 98 of the collaterals, leaving due \$9,573 55. The bank claimed a dividend on the original indebtedness, but were allowed to share only on the basis of the balance remaining due. The decision was placed upon a construction of the assignment which was regarded as directing that the assignees should pay the debts outstanding at the time of the execution of the trust, and not on the basis of the original indebtedness. The question also came before Judge Masten in the Superior Court of Buffalo, in the case of *Jervis v. Smith* (7 Abb. Pr. N. S. 217; s. c. 1 Sheldon, 189). In that case the plaintiffs, as sureties of one Rich, were secured by the pledge of certain bonds and stocks. Rich, having failed, and the plaintiffs having been called upon to meet their obligations as sureties, paid upwards of \$11,000—the securities realized \$4,500. Rich made an assignment, in which he directed his creditors to be paid "in proportion to the amounts due and owing by him to them respectively." The court held that the plaintiffs were entitled to a dividend upon the whole amount of their original indebtedness, without deducting the securities held by them or the proceeds. This decision is in direct conflict with the rule in bankruptcy and with the Massachusetts decisions. It is, however, sustained by a number of the cases cited above.

§ 399. *Priority of United States.*—It is provided by the Revised Statutes of the United States (§§ 3466, 3467), incor-

porating the provisions of the statutes of March 3d, 1797 (1 Stat. at Large, 515), and March 2d, 1799 (1 Stat. at Large, 676), that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." R. S. U. S. § 3466.

"Every executor, administrator or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." R. S. U. S. § 3467. "And when the principal in any bond given to the United States is insolvent, and his estate and effects are insufficient to pay the United States, the money due on the bond, any surety or his representative who pays to the United States the money due on the bond, has a like priority for the recovery and receipt of the money out of the estate of the insolvent as is secured to the United States, and may bring and maintain a suit upon the bond in law or equity in his own name for the recovery of all moneys paid thereon." R. S. U. S. § 3468.

The insolvency contemplated by these statutes is not a mere inability to pay, but a notorious or legal insolvency evidenced by some notorious act by which the debtor's property comes into the hands of an assignee or other officer for distribution. *Prince v. Bartlett*, 8 Cranch, 431; s. c. 9 Mass. 431; *Thelusion v. Smith*, Pet. C. C. 195; 2 Wheat. 393; *Conrad v. Atlantic Ins. Co.* 1 Pet. 386, 439. And the assignment must be a general one of all the debtor's property. *U. S. v. Monroe*, 5 Mason, 572; *U. S. v. Howland*, 4 Wheat. 108; *U. S. v. Clark*, Id. 629; *U. S. v. Hunter*, 5 Mason, 229; *U. S. v. Hooe*, 3

Cranch, 73; *Conrad v. Atlantic Ins. Co.* 1 Pet. 386, 439; *U. S. v. McLellan*, 3 Sumn. 345; *U. S. v. Bank of U. S.* 8 Rob. (La.) 262; *Dias v. Bouchard*, 10 Paige, 445; s. c. 1 N. Y. 210. An assignment of a portion, however large, without fraud, is not sufficient. *U. S. v. Monroe*, 5 Mason, 572. But if only a trifling portion of the assignor's estate be omitted or reserved, whether by mistake or for the purpose of evading the statute, such omission or reservation will not make the assignment a partial one, so as to defeat the priority. *U. S. v. Hooe*, 3 Cranch, 73; *U. S. v. Langton*, 5 Mason, 280, 289; *U. S. v. McLellan*, 3 Sumn. 345. Nor can the debtor, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignment being partial (*U. S. v. Bank of U. S.* 8 Rob. [La.] 262); but an assignment by a debtor who is insolvent, of his property in trust for the benefit of a single creditor or surety, containing no provision for the benefit of creditors generally, is not within the statute. *Bouchard v. Dias*, 1 N. Y. 201; rev'g 10 Paige, 445. If the assignment does not, on its face, appear to be general, the *onus probandi* is on the United States. *U. S. v. Clark*, 1 Paine, 629; *U. S. v. Langton*, 5 Mason, 280, 289; *U. S. v. Howland*, 4 Wheat. 108; see *Mott v. Maris' Assignees*, 2 Wash. C. C. 196.

The nature of the priority established in favor of the United States does not constitute a lien upon the property in favor of the United States (*Forsyth v. Clark*, 3 Wend. 637, 655), but simply a right of prior payment out of the general funds of the debtor in the hands of the assignee. *Conrad v. Atlantic Ins. Co.* 1 Pet. 439; *U. S. v. Hack*, 8 Pet. 271. The statute does not prevent the transmission of the property, but merely creates a preference in payment; and before this preference has attached, the debtor may convey or mortgage his property, or transfer it in the ordinary course of business. The statute does not effect any lien, general or specific, existing when the event takes place, giving the United States a claim of priority. *Brent v. Bank of Washington*, 10 Pet. 596; *U. S. v. Fisher*, 2 Cranch, 358; *U. S. v. Hooe*, 3 Id. 73. But the moment the assignee takes the property, he becomes a trustee for the United States, and bound to pay its debt first out of the proceeds. *Beaston v. Farmers' Bank of Del.* 12 Pet. 102.

The United States is entitled to priority of payment out of the effects of a bankrupt or insolvent debtor, whether he be principal or surety, or be solely or only jointly with others liable, and it is immaterial when the debt was contracted. *Lewis, Trustee, v. U. S.* 92 U. S. 618. And the form of the indebtedness, or the mode in which it was incurred, is immaterial. Thus, where a paymaster in the army fraudulently intrusted certain moneys of the United States with a firm of bankers, who knew that the money belonged to the United States, upon the insolvency of the bankers the United States became entitled to a priority of payment out of its assets. *Bayne v. U. S.* 93 U. S. 642. The debtor cannot defeat the priority by any provision of the assignment by giving a priority to another creditor, although that creditor may have parted with security in order to obtain the preference. *U. S. v. Mott*, 1 Paine, 188.

This right of priority attaches only on the residue of the fund in the assignee's hands, after payment of the expenses incurred in its collection. *U. S. v. Hunter*, 5 Mason, 229.

And the same right of priority which belongs to the Government attaches to the claim of an individual who, as surety, has paid money to the Government. *Hunter v. U. S.* 5 Pet. 173. A surety on a custom house bond, who has paid it, has the same priority as the United States against the estate of his principal in the hands of his assignee. *U. S. v. Hunter*, 5 Mason, 62. But he has no priority in a case where the United States would have none. *Bouchard v. Dias*, 1 N. Y. 201. Nor does it give him a right to maintain an action against an insolvent after his discharge. *Aiken v. Dunlap*, 16 Johns. 77.

§ 400. *Payment of dividend does not take the debt out of the statute of limitations.*—The payment of a dividend does not revive the debt. *Pickett v. Leonard*, 34 N. Y. 175; aff'g s. c. 34 Barb. 193; disapproving *Burger v. Darwin*, 22 Barb. 68; *Roosevelt v. Marks*, 6 Johns. Ch. 266, 292.

Such payment cannot amount to an acknowledgment or new promise on the part of the assignor, because the assignee has no authority to bind the assignor by such a promise. The acts of the assignee are beyond the control of the assignor. The

assignor is not at liberty to accompany a payment by the assignee with a qualification or disclaimer as when made by himself. Hunt, J., in *Pickett v. Leonard*, *supra*. So payments by an assignee in bankruptcy do not revive the debt. *Brandram v. Wharton*, 1 B. & Ald. 463; *Davies v. Edwards*, 7 Ex. 22; *Ex parte Topping*, 34 L. J. Bank. 44; *Roosevelt v. Marks*, 6 Johns. Ch. 292.

§ 401. *Interest*.—In distributing an insolvent's estate, the interest on all debts upon which interest is recoverable should be computed up to the assignment, and the interest should be discounted on such of the debts as are not then due or which are not upon interest. And where the whole amount is not paid at the date of the assignment, if assets afterwards come to the hands of the assignee more than sufficient to pay the several amounts as thus ascertained, interest should be computed on such amounts from the date of the assignment, so as to give a ratable distribution to the creditors. *In re Murray*, 6 Paige, 204.

§ 402. *Payments, how made*.—The assignees must not only ascertain the proper parties to be paid, but they must see to it that the money reaches the hands of the persons entitled to receive it, for if they make any mistake in the person to whom they pay the money, they are still liable to pay it to the proper person. *Perry on Trusts*, § 926. And if they pay to an agent of the party entitled, they must see to the genuineness of the authority of the agent to whom they pay or transfer the money. If there is forgery or fraud or want of authority in the person receiving it, the trustee will be responsible. *Perry on Trusts*, § 929; *Ashby v. Blackwell*, 2 Ed. 299. The final decree should provide for the case of persons who are abroad, or who refuse or neglect to receive their dividend after notice. In such case the court will direct that the money be deposited to the order of the party.

§ 403. *Enforcement of the decree*.—A decree directing the payment of money may be enforced in several ways. Such a decree, whether made in an action or in a proceeding in

the county court, may be docketed, and an execution issued thereon.

The general assignment act provides that all orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed, and enforced and appealed from, the same as if made in an original action brought in the county court. Laws of 1877, chap. 466, § 22.

The act also provides that the county court, on a proceeding for an accounting, shall have power "to punish as for a contempt any disobedience or violation of any order made or process issued under the act, and that it may exercise such other and further powers in respect to the proceedings and the accounting, as a surrogate may by law exercise in reference to an accounting by an executor or administrator." Laws of 1877, chap. 466, § 20, paragraphs 8 and 9.

The surrogate may enforce all lawful orders process and decrees of his court by attachment against the person of any one who neglects or refuses to comply with such orders and decrees, or to execute such process; such attachment being in form similar to that used by the court of chancery in analogous cases. 2 R. S. 221, § 6, paragraph 4. A surrogate's decree for the payment of money. *Doran v. Dempsey*, 1 Bradf. 490; *Seaman v. Duryea*, 11 N. Y. 328; aff'd 10 Barb. 523; *Frear's Case*, 15 Abb. Pr. 350; *Saltus v. Saltus*, 2 Lans. 9. The manner and circumstances under which a surrogate will issue an attachment for non-payment of money are stated by Mr. Redfield in his work on Surrogates at page 36 *et seq.*

In addition to these remedies, the statute (*ante*, § 287) authorizes a prosecution of the assignee's bond, and the application of the money derived on it, in the manner in which the assignee should have applied the moneys in his hand. The special instances in which an action upon the bond can be brought, are not specified in the statute. The party must first obtain leave of the court, and he must show a breach of the condition of the bond, to wit, that the assignee has not faithfully discharged the duties of his office (*ante*, § 287). The language of the present statute is in that respect broader than the act of 1860, by which it was provided that "whenever any such assignee or

assignees shall omit or refuse to perform any decree or order made against him, her or them, by a judge or court having jurisdiction to compel the payment of any debt out of such trust fund," the county judge might order the prosecution of the bond. The statute, however, clearly refers to the duties of the assignee *under* the assignment, and not to such as may devolve upon him in case the assignment is set aside. *People v. Chalmers*, 8 Supm. Ct. (1 Hun), 683.

In the analogous case of bonds given by executors and administrators, it has been held that a demand and refusal to obey the decree should be shown to sustain an action on the bond. The surrogate's order for a prosecution of the bond is not enough. *People v. Barnes*, 12 Wend. 492; *People v. Corlies*, 1 Sandf. 228. The order for the prosecution of the bond may be made *ex parte*. *People v. Rowland*, 5 Barb. 449. It is usual, however, to give notice of the application by an order to show cause.

§ 404. *Termination of the trust.*—The trusts under an assignment may be terminated and the assignee discharged in several ways.

The accomplishment of the purposes for which the trust was created will terminate it. Thus where the assignee has performed all his duties under the assignment, and distributed the proceeds, that is a discharge; and if, after the payment of all the debts provided for, any balance remains in the hands of the assignee, that will revert, by operation of law, to the assignor. A trust to sell real estate for the payment of debts ceases when the debts are in any mode paid or discharged. Thus where a debtor conveyed lands to a trustee upon trust to sell the same for the benefit of certain specified creditors, and to reconvey to himself such parts of the property as should remain unsold after satisfying the trusts, and afterwards conveyed his residuary interest in the property to the same trustees for the same creditors in satisfaction of their demands, the creditors on their part accepting the trust fund as a satisfaction of their claims, it was held that the original trust was determined, and that the whole legal and equitable title to the property be-

came vested under the statute in the creditors. *Selden v. Vermilya*, 3 N. Y. 525.

But though the trust has not ceased, and its purposes have not been performed, yet if all the parties who are interested in the trust fund consent and agree thereto, the court may decree the determination of the trust and discharge the trustee. This is illustrated by the case of a composition and discharge of the assignee under the act (*post*, § 405).

The trust may also terminate by lapse of time. Thus under the statute cited *ante*, § 369, if no different limitation is contained in the instrument creating the trust, it will be deemed discharged after the end of twenty-five years, and the estate will revert to the grantor.

The assignee may be discharged, though the trust continue, as in the case of the death, removal or resignation of the assignee.

§ 405. *Discharge of assignee on proof of composition.*—The statute cited in the previous chapter (*ante*, § 353), provides for the discharge of the assignee and his sureties from all further liability to compounding creditors on proof of a composition.

Under this statute, the proper course, when a composition has been effected by the assignor with his creditors within a year after the assignment, is for the assignee to apply for a citation for a final accounting, setting forth the fact of the assignment and the proceedings thereunder and the composition, and praying that his accounts may be passed, and that he may be authorized to make over the assigned property to the assignor, and that the assignee and his sureties be discharged. It has been repeatedly held that the assignee and his sureties will not be discharged without an accounting. *Matter of Weinholtz*, Daily Reg. July 26, 1878. No person but the assignee can apply for an accounting within a year from the date of the assignment, and there is no authority under the statute to issue a citation for an accounting, except on the petition of an assignee before the expiration of a year after the assignment, or on petition of a creditor, or an assignee's surety, or an assignor, after the lapse of a year from the date of the assignment, except

that the court may of its own motion order an accounting when the assignee is removed. The statute, therefore, does not appear to provide for a case where an assignor has effected a composition within a year after the assignment, and wishes to compel an accounting and return of the property at once, and the assignee is unwilling to aid him. In such a case it might be that, on application of a creditor, the court would remove the assignee and order an accounting and delivery of the property to the assignor on proof of a composition. See *Matter of Horsfall*, Daily Reg. July 9, 1878. Undoubtedly, in such a case, when the composition was fully completed, a court of equity would entertain a bill on behalf of the assignor to compel the assignee to surrender the property.

Very perplexing questions arise where the debtor, having made a general assignment, afterwards effects a composition in bankruptcy with his creditors, and then application is made to the county court to discharge the State assignee.

Without entering at large into the question of what effect such a composition in bankruptcy will have upon the title to the bankrupt's property where no assignee has been appointed in bankruptcy, and no assignment made to the bankrupt assignee in case the composition afterward fail and be set aside in bankruptcy (see *Blumenstiel's Bank*. 459 *et seq.*), it is enough for the present purpose to state the rule adopted by the State courts, to wit, that unless the composition in bankruptcy operates as an actual release, or has been specifically completed, so that creditors have in point of fact ceased to be creditors, or all the creditors consent, the court will not discharge the assignee or his sureties. *Matter of Backer*, 2 Abb. N. C. 179.

§ 406. *Discharge of assignee and his sureties on final accounting.*—The general assignment act expressly provides for the discharge of the assignee and his surety at any time upon performance of the decree, from all further liability upon matters included in the accounting to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement. Laws of 1877, ch. 466, § 20, para. 5. *Ante*, § 390, para. 5.

The decree should provide that the assignee may apply upon proofs showing a compliance with the decree for a further order discharging him and his sureties, in compliance with the statute.

There are three classes of persons barred by the discharge of an assignee: Firstly, creditors who have appeared; Secondly, creditors who have been duly cited but have failed to appear; and, Thirdly, those who, after due advertisement, have not presented their claims. *Matter of Weinholtz*, Daily Reg. July 26, 1878.

When the assignee undertakes to settle the estate without a final decree obtained in an action or proceeding on notice to all persons, he should, for his own protection, before he pays over the money, require a release from all claims against him. Such a requirement is not unreasonable, and though the release may be impeached for fraud, accident or mistake, yet it is *prima facie* evidence, and throws the burden of proof upon those seeking to impeach it. *Perry on Trusts*, § 922.

§ 407. *Distribution by trustees of insolvent debtors appointed under the Revised Statutes.*—"Out of the money in their hands the trustees may first deduct all the necessary disbursements made by them in the discharge of their duty, and a commission at the rate of five per cent. on the whole sum which will have come into their hands." 2 R. S. 46, § 29; 3 R. S. 6th ed. 40, § 31; 2 Edm. 47; 1 Fay's Dig. 390. See *Matter of Bunch*, 12 Wend. 280.

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him on any bond he may have executed for the purpose of retaining any property or any vessel for the benefit of all the creditors, and his costs for defending any such suit." 2 R. S. 46, § 30; 3 R. S. 6th ed. 40, § 32; 2 Edm. 47; 1 Fay's Dig. 390.

"Whenever any bond shall have been executed by an attaching creditor for the purpose in the last section specified, the trustees shall retain a sufficient sum from the moneys in their hands to indemnify such creditor until a final determination be

had respecting his liability." 2 R. S. 46, § 31; 3 R. S. 6th ed. 40, § 33; 2 Edm. 48; 1 Fay's Dig. 390. The article referred to in the last two sections has been repealed. (Laws of 1877, ch. 417.)

"They shall pay all debts due by such debtor to the United States, and all debts due by him to persons who, by the laws of the United States, have a preference in consequence of having paid money as sureties of such debtor." 2 R. S. 46, § 32; 3 R. S. 6th ed. 40, § 34; 2 Edm. 48; 1 Fay's Dig. 391.

"The trustees appointed under and in pursuance of the fifth chapter, of the second part, of the Revised Statutes, shall, out of the moneys in their hands, after deducting all the necessary disbursements made by them in the discharge of their duty and their commission, pay to the attaching creditor his costs and disbursements to be taxed." Laws of 1833, ch. 52, § 1; 3 R. S. 6th ed. 40, § 35.

"That in case of attachments against the property of absent, concealed, or non-resident debtors, pursuant to article first, title first, chapter fifth, of the second part of the Revised Statutes, when an attorney or counsellor shall be employed to conduct the proceedings, there shall be allowed and paid out of the funds of such debtor, before distribution to prosecuting creditor, the legal cost of such attorney and counsel, to be taxed by the judge issuing such attachment." Laws of 1834, ch. 245, § 1; 3 R. S. 6th ed. 41, § 36.

"That for such an attorney and counsel, for the necessary disbursements, and for drawing the necessary papers, the same rate of allowance shall be taxed as in cases prosecuted in the Supreme Court, where Supreme Court costs are allowable, and the like fees for attorney and counsel fee may be taxed for any attendance before the trustees as are now taxable upon a reference in the Supreme Court." Laws of 1834, ch. 245, § 2; 3 R. S. 6th ed. 41, § 37.

"They shall distribute the residue of the moneys in their hands among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows :

“1st. In the case of proceedings under the first article¹ of this title among those who were creditors at the time of issuing the first warrant of attachment.

“2d. In proceedings under the third² and fifth³ articles of this title among those who were creditors at the time of the execution of the assignment by the insolvent.

“3d. In proceedings under the fourth⁴ article, when an assignment was executed by an officer as therein directed among those who are creditors at the time of the first publication of notice to creditors to appear and determine whether they would unite in a petition, and when the assignment was voluntary among those who were creditors at the time of the execution thereof.

“4th. In proceedings under the sixth⁵ article, among those creditors at whose suit the debtor was imprisoned on execution at the time of his discharge.” 2 R. S. 47, § 33; 3 R. S. 6th ed. 41, § 38; 2 Edm. 48; Fay’s Dig. 391.

“In making such distribution, the trustees shall first pay all debts that may be owing by the debtor, as guardian, executor, administrator or trustee, and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them in proportion to their amounts respectively.” 2 R. S. 47, § 34; 3 R. S. 6th ed. 41, § 39; 2 Edm. 48; 1 Fay’s Dig. 391.

“Every person to whom a debtor (except one proceeding under the sixth article), shall be indebted on a valuable consideration for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors after deducting a rebate of legal interest upon the sum distributed for the time unexpired of such credits.” 2 R. S. 47, § 35; 3 R. S. 6th ed. 41, § 40; 2 Edm. 48; 1 Fay’s Dig. 391.

“If at the time any dividend is made any prosecution be pending against the trustees in which a demand against such a debtor may be established, the trustees may retain in their hands the proportion which would belong to such demand if

¹ Repealed Laws of 1877, chap. 417.

² *Ante*, Chaps. II, III, IV.

⁴ *Ante*, Chap. V.

³ *Ante*, Chap. VI.

⁵ *Ante*, Chap. VII.

established, and the necessary costs and expenses of such suit or proceeding to be applied according to the event of such proceeding or suit, or to be distributed in a second or other dividend." 2 R. S. 48, § 38; 3 R. S. 6th ed. 42, § 43; 2 Edm. 49; 1 Fay's Dig. 391.

"All penalties which shall be recovered by any trustees pursuant to the provisions of this title shall be deemed a part of the estate of the debtor, and shall be distributed as such among his creditors." 2 R. S. 48, § 39; 3 R. S. 6th ed. 42, § 44; 2 Edm. 49; 1 Fay's Dig. 391.

"If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall within the year thereafter make a second dividend of all the moneys belonging to the estate of the debtor then in their hands among the creditors entitled thereto as hereinbefore specified, and in like manner from year to year, so long as any moneys belonging to the estate of such debtor shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto." 2 R. S. 48, § 40; 3 R. S. 6th ed. 42, § 45; 2 Edm. 49; 1 Fay's Dig. 391.

"Any creditor who shall have neglected to deliver to the trustees an account of his demand before the first, second, third, or other dividend, and who shall deliver his account to them before the second or subsequent dividend, shall receive the sum he would have been entitled to on any former dividend, before any distribution be made to other creditors." 2 R. S. 48, § 41; 3 R. S. 6th ed. 42, § 46; 2 Edm. 49; 1 Fay's Dig. 392.

"If any dividend that shall have been declared shall remain unclaimed by the person entitled thereto for a year after the same was declared, the trustees shall consider it as relinquished, and shall distribute it on any subsequent dividend, among the other creditors." 2 R. S. 48, § 42; 3 R. S. 6th ed. 42, § 47; 2 Edm. 49; 1 Fay's Dig. 392.

"If, after settling the estate of any debtor, and discharging his debts entitled to a dividend, any surplus remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives." 2 R. S. 48, § 43; 3 R. S. 6th ed. 42, § 48; 2 Edm. 50; 1 Fay's Dig. 392.

“Every debtor who shall be discharged under the third, fourth or fifth articles of this title shall be allowed the sum of five per cent. on the net produce of all his estate that shall be received by the assignees, to be paid to him by them in case such net produce, after all allowance made, shall be sufficient to pay the creditors of such debtor entitled to a dividend, the sum of seventy-five cents on the dollar on the amount of their debts respectively, as the same shall have been ascertained, but the said allowance shall not exceed in the whole the sum of five hundred dollars.” 2 R. S. 48, § 44 ; 3 R. S. 6th ed. 42, § 49 ; 2 Edm. 50 ; 1 Fay’s Dig. 392.

PART V.

COMPOSITIONS.

CHAPTER XXX.

COMPOSITIONS AND COMPOSITION DEEDS.

§ 408. *In general.*—A consideration of the general subject of the relation of insolvent debtors to their creditors, would be incomplete without some reference to the private and amicable attempts of debtors and their creditors to arrange their affairs by means of compositions and composition deeds. Such arrangements may be made and enforced under the sanction of the common law. And since 1849, in England, compositions and amicable settlements with creditors have also been provided for under the provisions of the bankrupt law. Such was the case also under the late bankrupt law in this country. This chapter, however, has no reference to such proceedings, but deals only with arrangements between debtors and their creditors, which rest solely in contract. Such arrangements are not regulated by statute, and their validity and effect must be determined by reference to the general principles of law.

§ 409. *Smaller sum not satisfaction for a larger.*—It is a familiar rule of law that the acceptance of a lesser sum does not bar a demand for a greater, and *a fortiori* an agreement to accept a less sum will be no such bar.

So in Pinnel's case (5 Co~~st~~ 117), "it was resolved by the whole court that payment of a lesser sum on the day in satisfaction for a greater cannot be a satisfaction for the whole, be-

cause it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater. And in the leading case of *Cumber v. Wane* (1 Strange, 426; s. c. 1 Smith's L. C. 439), it was decided that a security of equal degree for a smaller sum, if it present no easier or better remedy, cannot be pleaded in an action for the larger one. And the reason of this rule is more fully stated by Lord Ellenborough, in *Fitch v. Sutton* (5 East, 230): "There must be some consideration for the relinquishment of the residue, something collateral to show the possibility of benefit to the party relinquishing his former claim, otherwise the agreement is *nudum pactum*." See *Down v. Hatcher*, 10 Ad. & El. 121; *Thomas v. Heathorn*, 2 B. & C. 477; *Acker v. Phoenix*, 4 Paige, 305; *Fellows v. Stevens*, 24 Wend. 294; *Dederick v. Lehman*, 9 Johns. 333; *Seymour v. Minturn*, 17 Id. 169; *Moss v. Shannon*, 1 Hilt. 177; *Bliss v. Schwartz*, 65 N. Y. 444.

But this rule must be taken with its qualifications. The payment of a less sum than the demand is a satisfaction when the debt is unliquidated. *Longridge v. Dorville*, 5 B. & A. 117; *Wilkinson v. Byers*, 1 Ad. & El. 106; *Palmerton v. Huxford*, 4 Den. 166; *Pierce v. Pierce*, 25 Barb. 243; *Farmers' Bank v. Blair*, 44 Barb. 641; see *Allen v. Borum*, 47 Id. 22; *Morton v. Ostrom*, 33 Id. 256; *Russell v. Cook*, 3 Hill, 504; *Stewart v. Ahrenfeldt*, 4 Den. 189; *McDaniel v. Lapham*, 21 Vt. 223, 234; *Donahue v. Woodbury*, 6 Cush. (Mass.) 150. A release under seal will import a sufficient consideration for the satisfaction of a greater sum, although but a less sum be in fact paid. *Knight v. Cox*, Bull. N. P. 153; *Harrison v. Close*, 2 Johns. 448; *Stearns v. Tappin*, 5 Duer, 294; *Noble v. Kelly*, 40 N. Y. 415. But not a receipt in full. *Scaife v. Jackson*, 3 B. & C. 421; *Finch v. Sutton*, 5 East, 229; *Farrar v. Hutchinson*, 9 Ad. & El. 641; *Ryan v. Ward*, 48 N. Y. 204.

An agreement by a creditor with a third person to accept from him less than the demand against the debtor in satisfaction of it is valid and may be enforced. *Lewis v. Jones*, 4 B. & C. 506; *Babcock v. Dill*, 43 Barb. 577; *Goldenburgh v. Hoffman*, 69 N. Y. 322; aff'd 7 Hun, 324; *La Page v. McCrea*, 1 Wend. 164, 172. So 'the acceptance of a note of a third person, for a less sum than the debt due in full, payment

is a bar to an action to recover any portion of the debt beyond the sum secured by the note. *Kellogg v. Richards*, 14 Wend. 116; *Webb v. Goldsmith*, 2 Duer, 413.

And, in general, if there be any benefit, or even legal possibility of benefit to the creditor thrown in, so as to work an accord and satisfaction, the reason upon which the technical rule of law rests will cease, and with it the rule will cease to apply. *Cumber v. Wane*, 1 Smith's L. Cas. 439.

§ 410. *Composition with creditors an exception.*—An apparent exception to the general rule of law stated in the foregoing section is found in the case of a composition by a debtor with several or all of his creditors, by which they agree to accept less than their entire demand. Such an agreement, if entered into with the debtor by a number of creditors, each acting on the faith of the engagement of the others will be binding upon them, for each, in that case, has the undertakings of the rest as a consideration for his own undertaking. *Steinman v. Magnus*, 2 Camp. 124; *Boothbey v. Lowden*, 3 Id. 175; *Greenwood v. Ledbetter*, 12 Price, 183; *Anstey v. Marden*, 1 N. R. 124; *Way v. Langley*, 15 Ohio St. 392; *Perkins v. Lockwood*, 100 Mass. 250.

“The law with respect to defences founded in compositions,” says Mr. Justice Williams, in *Byrd v. Hind* (1 Hurl. & N. 938, 947), “between a debtor and his creditors appears not to have been distinctly defined until the case of *Good v. Cheesman* (2 B. & Adol. 328). It used to be sometimes laid down that a right of action once vested could only be barred by a release or an accord and satisfaction. But since the decision of that case the law has been regarded as settled, that a composition agreement, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accept the new agreement in satisfaction thereof; and that for such agreement there is a good consideration for each creditor, viz.: the undertaking of the other compounding creditors to give up a part of their claim.

But no such agreement can operate as a defence if made

merely between a debtor and a single creditor; the other creditors, or some of them, must also join in the agreement with the debtor and with each other, for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater, which would be invalid by reason of want of consideration for relinquishing the residue."

"Where creditors thus mutually agree with each other," says Mr. Justice Daly, in *Williams v. Carrington* (1 Hilt. 514, 519), "the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his whole claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive by putting it out of the power of the debtor to carry out the composition."

§ 411. *Composition, how effected.* No special formalities are requisite to effect a composition. Indeed, the agreements on the part of the several creditors need not be reduced to writing. "Their effect as discharge," says Mr. Justice Cowen in *Fellows v. Stevens* (24 Wend. 294, 297), "is based not so much upon the sort of instruments or other acts by which they are effected, as upon there being an agreement upon sufficient consideration among the several parties, the debtor on the one side, his creditors on the other, and these latter among themselves. * * * There need not that I can see, be a seal or any other formal solemnity. To do the whole by parol would be exceedingly loose and often unavailable for want of adequate proof, but where the debts reside in simple contract, I see no reason, if clearly proved, why an oral composition would not be equal to any other."

In that case, the court remarked, that if the debts were due by specialty the composition might perhaps require a seal, but in *Van Bokkelen v. Taylor* (62 N. Y. 105), which was an action to foreclose a bond and mortgage, the defendant relied upon a release signed by the holder of the bond and mortgage, and other creditors, to each of whose signatures an internal revenue stamp had been affixed, the court, in the absence of

evidence that these stamps were not used as seals, refused to disturb a finding of the court below, but Mr. Justice Rapallo, in delivering the opinion of the court, remarked that the release being a composition by creditors, in which several united, would have been operative without a seal. And in a number of instances, agreements by creditors to compromise, expressed by acts and words and not by writing, have been held valid and binding upon them. Thus in *Fawcett v. Gee* (3 Anst. 910), the mode of settling with the creditors was merely by cancelling the notes held by each of them, without any deed or release. So in *Bradley v. Gregory* (2 Camp, 333), the creditor was held bound by the terms of a resolution accepted at a meeting of all the creditors, and afterwards ratified orally by him. See *Williams v. Carrington*, 1 Hilt, 515.

Although the mutuality of the promises is the consideration which supports the instrument as to each creditor who signs, it does not follow that as to the last creditor who signs there is no such mutuality. The execution is to be deemed contemporaneous under one general influence and one general consideration. *Hall v. Merrill*, 9 Abb. Pr. 116. And where in a composition deed, in which the creditors bound themselves "severally and each for himself," it was claimed that the contract of each creditor was several and therefore without consideration, the court held that the agreement was mutual and mutually binding upon all who signed it, and that it was not necessary that the agreement should express the mutuality, since it was sufficiently implied from the nature of the agreement. *Horstman v. Miller*, 35 Supr. Ct. (3 J. & C.) 29.

A composition by which a debtor undertakes to settle with his creditors at a *pro rata* payment less than the sum due them, is to be distinguished from a transaction where a third person steps in and purchases from the creditors of a failing debtor his debts at a stipulated per centum and takes an assignment to himself. If he is acting purely as the agent of the debtor, and takes the assignment for the benefit of the debtor, and that fact clearly appears, the assignment may doubtless be considered as in substance a compromise made by the debtor himself, but if he takes the title of the debt to himself for a valuable consideration paid by himself, so that he is at liberty to enforce it

himself against the original debtor, the transaction is one of purchase and sale, wherein the liability of the debtor passes from the original creditor to the purchaser. *Goldenbergh v. Hoffman*, 14 Supm. Ct. (7 Hun), 324; *aff'd* 69 N. Y. 322.

§ 412. *Power of partner to compound.* Although it is sometimes said that one partner has no authority by the mere partnership relation to bind the partnership by seal, yet this rule applies only to grants and not to releases. *Perry v. Jackson*, 4 T. R. 519; *Gibson v. Winter*, 5 B. & Ad. 96. Hence one of two partners may release for both (*Beach v. Ollendorf*, 1 Hilt. 41; *Bruen v. Marquand*, 17 Johns. 58), and as he may give a release personally so he may delegate this power by seal to another. *Wells v. Evans*, 20 Wend. 251; *rev'd* on other grounds, 22 Id. 334.

§ 413. *Composition with a portion of the creditors.* It seems to be fully settled by the authorities, that a composition agreement between a debtor and a portion of his creditors is valid and binding. The consideration of the relinquishment of a part of their claim by the others is sufficient to make the promise and discharge of each of those who join obligatory. *Renard v. Tuller*, 4 Bosw. 107; *Hall v. Merrill*, 9 Abb. Pr. 116; *Norman v. Thompson*, 4 Exch. 755; *Good v. Cheesman*, 2 B. & Ad. 328; *Byrd v. Hind*, 1 H. & N. 938; *Brown v. Dakeyne*, 11 Jur. 39. In order, therefore, that the agreement should be inoperative unless all the creditors sign it, such a condition should be expressly declared or be clearly deducible from unambiguous language. *Renard v. Tuller, supra*.

When the composition deed is general on its face, and there is nothing to show that it is a part of the agreement that all the creditors shall sign, and in the absence of fraud, the parties will be bound by the instrument they make, and cannot introduce verbal declarations made by the parties at the time when they executed it to show that it was to be void unless signed by all. *Lewis v. Jones*, 4 Barn. & Cres. 506.

An agreement for a composition ought to contain a clause that the instrument shall be void unless all the creditors sign. *Lewis v. Jones, supra*.

Indeed, in the case last cited, Mr. Justice Bayley says that no man in his senses ought to sign such an instrument without such a clause, for otherwise the object of the instrument may be defeated.

And where the condition upon which a composition is based, is that all the creditors shall agree to a similar composition, this is a condition precedent to the legal operation of the composition as a discharge, and the burden is on the debtor to show that all the creditors have agreed to the composition. *Durgin v. Ireland*, 14 N. Y. 322; *Babcock v. Dill*, 43 Barb. 577.

So a creditor may limit the operation of a composition by writing after his signature, at the time of execution, that the execution of the instrument by him shall be null and void unless all the creditors sign within a given time. *Magee v. Kast*, 49 Cal. 141.

When the instrument of release stipulated that it should be void if not agreed to by *all* creditors in a given place, and it was signed by several, the party setting it up must show that those who assented comprised all the creditors designated. *Lower v. Clement*, 25 Penn. St. 63.

Where certain execution creditors with other general creditors (but not all) of the debtor, agreed that they would stay proceedings for four months, and that if executions were issued upon the claims of any of the signers, those creditors who already had executions in the hands of the sheriff should have priority, and if the property was insufficient the proceeds should be distributed among them *pro rata*, and the debtor, to induce the creditors to sign, represented the claim of one of the creditors at less than the amount actually due him, and confessed judgment to that creditor to induce him to sign, and he issued an execution, and the property was sold, it was held that this was a fraud on the other creditors and that the judgment so confessed was void as to them but not as to those who had not signed, and that as between the signers the agreement to distribute ratably must be carried out. *Loucheim's Appeal*, 67 Penn. St. 49.

An interesting question arises in the case of sureties who have indorsed composition paper which has been delivered so

indorsed, on the supposition that all the creditors have joined, when in fact they have not. In *Whittemore v. Obear* (58 Mo. 280), it was held that in such a case it was the duty of the surety to see to it that all the creditors had signed the agreement, and that his indorsement of the notes as to a creditor who was ignorant of any failure in the fulfillment of the condition or its procurement by fraud, was a waiver of that condition, and that he could not avail himself of such failure or fraud against such creditor, and even if the creditor was aware of such failure or fraud and chose to waive the objection, it did not lie in the mouth of the surety to set it up as a defence, but in *Doughty v. Savage* (28 Conn. 146), it was held that the agreement and notes were part of one transaction, and that the surety was not liable on the notes.

In *Harvier v. Guion* (3 E. D. Smith, 76), where the composition was payable in installments of six, twelve and eighteen months, with the condition annexed that unless three-fourths of the non-preferred creditors executed the composition deed, it should be void and of no effect, the court held, upon a construction of the whole instrument, that the defendant had the full eighteen months to obtain the signatures of the three-fourths of his creditors, and that the instrument was a good defence to an action brought by the plaintiff within the stipulated time, if the installments were paid as they became payable by the terms of the composition deed.

§ 414. *Agreement to join in composition deed.*—Where a creditor consents to accept a composition of his debt, on the strength of which other creditors are induced to join in the composition, or relying upon which, the debtor, in conformity with the agreement, makes over his property to a trustee, the creditor so assenting, if he afterward refuse to execute the composition, will be held to the terms of the agreement. Thus, where the defendants were insolvent, but possessed of a large quantity of property, and it was agreed between them and their creditors, including the plaintiffs, that the defendants should assign their property to a trustee, and the creditors agreed to release the defendants from their debts, and the defendants performed the agreement on their part, and executed

the assignment, it was held that the agreement was thereby executed, and the plaintiffs could not maintain an action against the defendant upon their indebtedness. *Therasson v. Peterson*, 4 Abb. Dec. 396.

So where the creditor of an insolvent had consented to accept a composition of his debt, and ordered a draft of the deed of assignment to be sent to his attorney for perusal, who approved of it, and the deed was executed by the debtor and the rest of the creditors, but the above-mentioned creditor afterwards refused to execute the same, it was held that he could not sue for the original debt. *Butler v. Rhodes*, 1 Esp. 236. Lord Kenyon said that "the principle upon which the action could not be maintained was that in consequence of this act of the plaintiff the defendant had parted with all his property, and the other creditors had been induced to execute the deed." And in another case, where the administratrix of an insolvent, finding his effects insufficient to pay all the creditors fully, had called a meeting and proposed a ratable distribution, to which they at first all unanimously assented, but afterwards, when a deed of assignment to trustees, with covenants not to sue, etc., was prepared, one of the creditors refused to sign it, although the rest did so, it was held that this, if made out by evidence, would be a good defence to an action of assumpsit brought by the creditor who refused, against the administratrix. *Brady v. Shiel*, 1 Camp. 147.

But it does not appear to be necessary that the debtor should have parted with anything if other creditors have altered their relations to him by accepting the composition, being induced thereto by the assent of a creditor.

So where a debtor, who was in difficulties, undertook to procure the acceptance of a third person for 7s. in the pound, to give his notes for 3s. more to prepare a composition deed, with a clause of release, and to procure the other creditors to execute it, and a creditor undertook to accept the composition and to sign the deed, but afterwards refused to do so, it was held that an action by him against the debtor could not be maintained. *Bradley v. Gregory*, 2 Camp. 383.

And on another occasion, where there had been a meeting of the creditors of A, who was in embarrassed circumstances,

at which B., one of the creditors, was present, and it was agreed that if the statement then made by the insolvent was correct, they would accept a composition and give him a release, and B. subsequently promised to come into the composition and execute the deed, but afterwards, when the deed had been executed, and a tender of certain acceptances made to B., he refused to accept them or execute the deed, he was not allowed to recover in an action brought for his original debt. *Bradley v. Gregory*, 2 Camp. 383.

Lord Ellenborough said: "It is said this agreement is executory, and therefore cannot be a bar. I think it is executed. Everything on the defendant's part was performed. As far as depended upon him there has been satisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all he stipulated for. Accord is no bar without satisfaction, but a party is not to be permitted to say there is no satisfaction to whom satisfaction has been tendered according to the terms of the accord."

In conformity with the same principle when the plaintiffs signed an agreement to accept a composition of 5*s.* in the pound, but afterwards threw obstacles in the way of settling the amount of debt due to them, and after a release from the creditors to the defendant had been prepared and signed by all the creditors except the plaintiffs, refused to accept the composition of the debt which he claimed, and which was offered them by the defendant's attorney, it was ruled that they could not recover more than the composition on their debt. *Reay v. White*, 1 C. & M. 748; see also, *Butler v. Rhodes*, 1 Esp. 236; *Cook v. Saunders*, 1 B. & A. 46; *Wood v. Roberts*, 2 Stark. 417.

But a mere assurance on the part of creditor, that he will unite in any arrangement which the other creditors might make looking to a future period for the making of such an agreement, and reserving a *locus penitentiae*, is not evidence of an accord of creditors which supplies the valuable consideration upon which alone rests the validity of a composition. *Hartell v. Morgan*, 1 Pitts. (Pa.) 354.

But a creditor who has signified his assent to a composition may openly withdraw with the consent of the debtor, and in

that event the agreement for a composition is not a bar to an action for the recovery of the original indebtedness. *Fellows v. Stevens*, 24 Wend. 294. And in *Reay v. Richardson* (2 C. M. & R.), Lord Abinger said: "I am by no means prepared to say that if several creditors were to sign an agreement for a composition on the faith of the others coming in, and they afterwards repented before the others came into the arrangement, it would still be binding on them and that there could be no *locus penitentiae* for them.

§ 415. *Fraudulent representations by debtor.*—In effecting a composition agreement, the policy of the law demands the utmost good faith on the part of the debtor. If he make a statement of his affairs as the basis of the agreement, he is answerable for the truth of the statement. If a debtor fraudulently leads his creditors to believe that he is insolvent, and thus induces them to enter into a composition, the fraud will vitiate the composition. He cannot be permitted, by pretending to be insolvent, to induce a creditor to accept one-half of a debt in lieu of the whole, when, in fact, his property is ample to pay the creditors in full. *Hefler v. Cohen*, 73 Ill. 296; *Monger v. Kett*, 11 Mod. 558. So, if the debtor fraudulently suppress the fact of his having property, and knowingly leaves his creditors to act under a false impression. *Vine v. Mitchell*, 1 Moody & R. 337. And where the information given by the debtor to his creditors respecting his property and debts is in any material respect untrue, the misrepresentation will vacate the compromise. *Irving v. Humphrey*, Hopk. 284.

So, a willful understatement of the amount of a particular debt, or what is the same thing, keeping back one or more demands, is an attempt at fraud on the part of the creditor, and he cannot recover on the amount suppressed. *Holmes v. Viner*, 1 Esp. 134; *Britten v. Hughes*, 5 Bing. 460; see *Fabram v. Freeman*, 2 C. & M. 451; overruling *Howard v. Bartolozzi*, 4 B. & Ad. 555; but see *Huntington v. Clark*, 39 Conn. 540.

But this principle does not apply where the other creditors are not kept in ignorance of the fact. *Payler v. Homersham*, 4 M. & S. 423.

Where there is a misrepresentation on the part of the debtor to the effect that other creditors have agreed to accept a composition of their debts, the agreement is not binding; the creditor having been imposed upon when he entered into it. *Cooling v. Noyes*, 6 T. R. 263.

But where the composition is effected by a third person who advances his money to accomplish it, it seems that fraudulent representations made by the debtor to induce creditors to become parties will not invalidate the compromise, at all events if the creditor desires to rescind, he must restore to the third party the amount he has received under the agreement. *Babcock v. Dill*, 43 Barb. 577.

§ 416. *What debts are included.*—If a creditor execute a composition deed and does not set the amount of his debt opposite his name, but leaves a blank, he will be bound by the terms of the composition to the amount of his then existing debt. *Harrhy v. Wall*, 1 B. & Al. 103.

A composition agreement should be limited in its effect to such matters as were within the contemplation and intention of the parties at the time of its execution. *Butcher v. Butcher*, 1 Bos. & Pull. 113. Hence, where a debtor had given to his creditor four promissory notes, one of which the creditor had indorsed and discounted, and the creditor then entered into a composition with the debtor, by which the creditors agreed to accept a per centage in full discharge and satisfaction of the several debts and sums of money that the debtor “does owe or stand indebted unto us,” it was held that this applied only to the sums then due, and where the creditor was subsequently compelled to take up the discounted note, he was not precluded by the composition from suing the debtor for the amount expended to take up the note. *Lipman v. Lowitz*, 83 Ill. 252.

A creditor who signs and inserts an amount as due to him in a composition deed, cannot subsequently maintain an action against the debtor for a demand existing at the time of the composition, but not then taken into account. *Russell v. Rogers*, 10 Wend. 473.

But where the agreement was to accept ten per cent. of the amount due, and the ten per cent. was to be paid within

thirty days, and a creditor held a note and account then due, and a note which would not become due until after the expiration of the thirty days, it was held that the last note was not included in the composition deed. *Hamblen v. Ratigan*, 119 Mass. 153.

And where a creditor who joined in the composition held three notes, two of which he had previously sold and taken back under false representations by the purchaser, and at the time of signing the agreement was, with the knowledge of the debtor endeavoring to force the purchaser to take back, which was done before the date at which the composition notes began to carry interest, it was held in an action by the creditor upon the note not sold that the creditor, not being in possession or control of the two notes sold the debtor, was not obliged as to them to tender the composition notes, and that as to the note in suit the debtor was not obliged to tender the composition notes, after the transfer of the other two notes which the debtor had paid to the purchaser. *Farrington v. Hodgdon*, 119 Mass. 453.

Where a creditor signs off for a demand which he has previously transferred to another, he impliedly undertakes to protect the debtor against such demand, and if the debtor is compelled to pay such demand he can recover of the creditor. *Harloe v. Foster*, 53 N. Y. 385; *Hawley v. Beverly*, 6 Scott N. R. 837; s. c. 6 Man. & G. 221.

Where a party deliberately includes a person as a creditor in a composition, and pays him the amount of the composition agreement, he cannot afterwards repudiate the compromise and recover back the money on the ground of an alleged mistake. *Jones v. Wright*, 71 Ill. 61.

§ 417. *Reservations against sureties.* The general rule of law is that if the principal is released by the creditor without reservation, the surety is thereby discharged, and the same result follows when the time of payment is, without the consent of the surety by a binding agreement between the principal and creditor, extended for a definite time. A composition deed releasing the debtor, should reserve any right or remedy

which the creditors may have against any other person or persons in respect to any debt due by the debtor. If the creditor, at the time he releases the debtor, does so reserve his remedies, the release will be construed as a covenant not to sue only and not as an absolute discharge, and the surety will still be held. As against the debtor the debt is gone under a covenant not to sue, but as against any other person the debt is not gone but is still extant. *Kirby v. Turner*, 6 Johns. Ch. 242; *Hubbell v. Carpenter*, 5 N. Y. 171; *Green v. Wynn*, L. R. 4 Chan. App. 204; affi'g s. c. L. R. 7 Eq. Cas. 92; *Richardson v. Pierce*, 119 Mass. 165; Brandt on Suretyship, § 123; *Ex parte Glendinning*, Buck, 519; *Ex parte Gifford*, 6 Ves. 807; *Lewis v. Jones*, 4 B. & C. 506, note.

§ 418. *The debtor must perform strictly.* The debtor is bound to a strict performance of the agreement upon his part, and a court of equity will not relieve him from the consequences of his failure upon the ground of forfeiture. *Haggerty v. Simpson*, 1 E. D. Smith, 67. If he makes default in performing any of the conditions imposed upon him as his part of the agreement, he remits his creditors to their original rights and may be sued by them for the full amount of their respective debts. *Penniman v. Elliott*, 27 Barb. 315; *Haggerty v. Simpson*, *supra*; *Mackenzie v. Mackenzie*, 16 Ves. 372.

When no time is specified within which the composition notes are to be given, the debtor has a reasonable time to tender them. *Oughton v. Trotter*, 2 Nev. & Man. 71. But if a time is specified he must tender them within the time.

Where the creditors agreed to accept a composition of 6s. in the pound, and that promissory notes for that amount should be given within fourteen days, the creditors assenting thereto within that time, unless the debtor can show a delivery or tender of the notes within the specified time he will be liable on his original indebtedness to the creditors who have assented. *Oughton v. Trotter*, 2 N. & M. 71.

So where creditors agreed to accept an assignment of all the debtor's property to a trustee, in full of all demands, and to execute releases as soon as the property should realize a specified

sum, and the property did not realize that sum, it was held that the agreement was no bar to an action by one of the creditors. *Wigglesworth v. White*, 1 Stark. 218.

And when the creditors agreed to take a composition secured by promissory notes payable on days certain, and the defendant was to assign to the creditors certain debts upon which the creditors were to execute a general release, and the assignment was executed, and all the creditors except the plaintiff received their composition and executed the release, and the plaintiff might have received his promissory notes if he had applied for them, but it did not appear that the defendant had ever tendered them or that the plaintiff had ever applied for them, and the plaintiff, after the day of payment of the notes, sued the defendants on the original indebtedness, it was held that he was not precluded by the agreement from recovering. *Cranley v. Hillary*, 2 M. & S. 120.

Although a debtor compounding with his creditors gives them the security of a third person for payment of a part of the stipulated dividend he is not discharged on payment of that part only if the residue continues unpaid. *Walker v. Seaborne*, 1 Taunt. 526.

But when the composition agreement was that the debtors were to pay a certain sum on their notes, at six, nine and twelve months from February 1, 1857, and the debtor tendered notes dated January 1st, 1857, for seven, ten and thirteen months, this was held to be an immaterial variation. *Renard v. Tuller*, 4 Bosw. 107. And where the composition notes were to be dated January 1st, 1858, but no time for their delivery was expressed, and the notes were not in fact tendered until the middle of February, this was not regarded as such a breach of the composition deed as to exempt the plaintiff from its obligation. *Hall v. Merrill*, 9 Abb. Pr. 116.

Though a creditor is not bound to accept payment under a composition deed, unless it is tendered when due, yet if he do accept payment after default, that will be a waiver of the delay, and so if the money is paid to an agent and the creditor ratifies the agent's act by receiving and retaining the money. *Penniman v. Elliott*, 27 Barb. 315.

And it seems that the fact that the debtor notifies his cred-

itors that the composition notes will not be paid, if in fact the money is deposited to pay them at the place where they are payable, will not excuse the creditors from presenting their notes for payment, nor will it revive the original indebtedness. *Green v. McArthur*, 34 Barb. 450.

§ 419. *Private stipulation with particular creditor.*—“Every composition deed,” says Mr. Justice Duer, in *Beech v. Cole* (4 Sandf. 79, 83), “is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid and given, and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed.” It follows that every agreement made by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts, is fraudulent and void. *Russell v. Rogers*, 10 Wend. 473; *Williams v. Carrington*, 1 Hilt. 515; *Eldridge v. Strong*, 34 N. Y. Supr. Ct. (J. & S.) 491; *Carroll v. Shields*, 4 E. D. Smith, 466; *Pinneo v. Higgins*, 12 Abb. Pr. 334; *Bliss v. Mattison*, 45 N. Y. 22; *Cockshott v. Bennett*, 2 T. R. 763; *Estabrook v. Scott*, 3 Ves. 455; *Higsons v. Pitt*, 4 Exch. 312; *Geere v. Mare*, 2 H. & C. 339; *Clay v. Ray*, 17 C. B. N. S. 188. Justice Story, referring to this principle of law, says (1 Story’s Eq. § 379): “There is great wisdom and policy in the doctrine, and it is founded in the best of all protective policy, that which acts by way of precaution rather than by mere remedial justice; for it has a tendency to suppress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted not for the sake of the debtor, for no deceit or oppression may have been practised upon him, but for the sake of honest and humane and unsuspecting creditors. And hence the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he is a mere volunteer, offering his services and aiding in the intended deception.”

The doctrine that, if a body of creditors join in accepting a composition, any underhand agreement made by a particular creditor with the debtor for some private advantage to himself is void and cannot be enforced, as being a fraud upon the rest, was established in equity some time before it obtained admission into courts of law, and the course there was to grant injunctions, either for delivering up the securities or for restraining parties from proceeding upon them at law. *Jackman v. Mitchell*, 13 Ves. 581; *Middleton v. Onslow*, 1 P. Wms. 768; *Constantine v. Blanche*, 1 Cox, 287; *Spurvet v. Spiller*, 1 Atk. 105; 2 Ves. 156.

But in *Cockshott v. Bennett* (2 T. R. 763), where Lord Kenyon applied the same doctrine in a court of law, he expressly disclaimed, founding his opinion upon grounds of equity as contradistinguished from grounds of law, and the doctrine has since that time been recognized as fully at law as in equity.

The effect of such a fraudulent agreement is to render the composition deed utterly unavailing as a protection to the debtor. The fraud avoids it from the beginning, and the creditor's debts are, therefore, wholly unaffected by it. Hence a creditor, even though he may have received from the debtor the amount provided by the assignment, may retain that sum and still sue for the unpaid balance of his original debt. *Hefter v. Cohn*, 73 Ill. 296; *Beach v. Ollendorf*, 1 Hilt. 41; *Stuart v. Blum*, 28 Penn. St. 225; *Wiggin v. Bush*, 12 Johns. 305; *Pierce v. Wood*, 23 N. H. 519; *Spooner v. Whiston*, 17 Eng. C. L. 580. In such a case the payment is not to be referred to the void contract, but to the original indebtedness. *Stuart v. Blum*, *supra*. But where the composition is affected by a third person who pays his money to the creditors under the composition, creditors who seek to avoid the composition by showing the fraud of the principal debtor, must offer to restore to the third party what they have received from him. *Babcock v. Dill*, 43 Barb. 577.

A secret agreement by a creditor party to a composition deed, by which he is to receive a sum over and above the dividend stipulated for in the deed, is void, and it is immaterial that all other creditors had executed the deed before such creditor agreed to become a party on receiving a security for the

additional sum. *Patterson v. Boehm*, 4 Penn. St. 507; *Howden v. Haigh*, 11 A. & El. 1033; *Steinman v. Magnus*, 11 East, 390.

The ground of this doctrine is not only that the preferred creditor diminishes the fund which by the implied assent of the parties is to be distributed ratably among those who join in the composition. If the advantage the creditor secures is one that does not impair the debtor's resources, nor affect the means available for the creditors, it may nevertheless be a deception and fraud upon them, because they are induced to enter into the composition by the supposition that all the creditors are to suffer equally. Best, J., in *Knight v. Hunt*, 5 Bing. 432. In the case last cited the debtor offered a composition of 10s. in the pound. The debtor's brother, to induce the plaintiff to sign voluntarily, proposed to give him coals to the amount of £150. In an action by the plaintiff to recover for the amount stipulated under the composition, it was held that he could not recover. So in *Howden v. Haigh* (11 A. & E. 1033), where the debtor, to induce the plaintiff to join in the composition, endorsed to him a bill accepted by a third party in addition to the composition notes, it was held that the plaintiff could not recover upon the composition notes, although it did not appear that the acceptance so indorsed had been paid or enforced. And in *Pfleger v. Browne* (25 Beav. 391), where the debtor, in addition to the composition, agreed to keep up a policy on his life for the benefit of one of his creditors, it was held that the agreement was void without the assent of all the creditors, and that the debtor's legal representatives were entitled to the policy. In that case Sir John Romelly, Master of the Rolls, stated the law and the reason of it very clearly. He says: "It is no consideration for the release of a debt to take a portion of it. But one of the exceptions is the case of a composition with creditors. It is an exception for this reason, that if a person makes a composition with his creditors, it is always assumed that each creditor acts upon the belief and assumption that the others will accept exactly the same amount as he takes, and nothing more. If it could be proved that one creditor who takes more had entered into an agreement not merely with his

debtor but with every other creditor, that he should be allowed to do so, then, no doubt, it would be sufficient. But if any one creditor who has accepted the composition, has not also agreed that one should take a larger benefit than the rest, then the consideration fails, because the assumed principle upon which the composition proceeds is that every creditor is to be treated alike in the arrangement." And on this point, see also *Smith v. Bromley*, Doug. 696, n.; *Jones v. Burkley*, Id. 684; *Middleton v. Ld. Onslow*, 1 P. Wms. 768.

Nor can it make any difference that the favored creditor receives no more than other creditors, but only a better security. This point was ruled in *Leicester v. Rose* (4 East, 372), and was approved in *Ex parte Sadler* (15 Ves. 52); *Pfleger v. Browne* (28 Beav. 391); *Williams v. Carington* (1 Hilt. 515); *Bean v. Amsinck* (10 Blatch. 361).

The principle is equally applicable when the composition calls for payment of the entire indebtedness, but in installments on an extension of time,—as where a debtor who by composition had obtained an extension from all his creditors, gave one creditor a bond as additional security to induce him to join in the composition. *Cecil v. Plaistow*, 1 Aust. 202.

§ 420. *Securities for an undue advantage to one creditor void.*—Not only does a fraud, such as we have referred to in the last section, invalidate the composition as a defence to a creditor's claim, but the creditor who undertakes to obtain an undue advantage over other creditors will be unable to enforce any such advantage. "So scrupulous are courts," says Mr. Justice Nelson in *Russell v. Rogers* (10 Wend. 473), "in compelling creditors to the observance of good faith toward one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative." So no contract to pay money, or do any other valuable thing, and no security given upon any such promise, whereby a creditor obtains an advantage peculiar to himself, can be enforced, and however formal the instrument may be by which it is expressed, parol evidence is always admissible to show the fraud and thus avoid it. *Cock-*

shott v. Bennett, 2 T. R. 763; *Carroll v. Shields*, 4 E. D. Smith, 466; *Bruce v. Lee*, 4 Johns. 410; *Waite v. Harper*, 2 Id. 386; *Wiggin v. Bush*, 12 Id. 306; *Payne v. Elden*, 3 Caines, 213; *Russell v. Rogers*, 10 Wend. 473; *Higgins v. Meyer*, 10 How. Pr. 364; *Lawrence v. Clark*, 36 N. Y. 128; *Townsend v. Newell*, 22 How. Pr. 164; *Crandall v. Cochran*, 3 Supm. Ct. (T. & C.) 203; *Breck v. Cole*, 4 Sandf. 79; *Harvey v. Hunt*, 119 Mass. 279.

Of course, the advantage received by the creditors refers to something additional to what is received by other creditors, and not to something additional to the creditor's claim. *Townsend v. Newell*, 22 How. 164. And it makes no difference what device is resorted to, if the object is to gain an advantage for one creditor over others. *Eldridge v. Strong*, 34 Super. Ct. (J. & S.) 491.

And the creditor guilty of such fraud will suffer not only to the extent of the amount which he has attempted to obtain unduly, but he may lose the amount due under the composition also. The agreement is not void for the excess merely, if at all, it is void *in toto*. *Howden v. Haigh*, 11 A. & E. 1033; *Moses v. Kalzenberger*, 1 Handy (O.) 46; *Clay v. Ray*, 17 C. B. N. S. 188; *Hughes v. Alexander*, 5 Duer. 488.

And so money paid by the debtor under such a fraudulent agreement, may be recovered back from the creditor in an action for money had and received. *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 M. & W. 492; *Atkinson v. Denby*, 7 H. & N. 934; *Smith v. Bromley*, 2 Doug. 695, note; see *Bean v. Amsinck*, 10 Blatch. 361. To this doctrine it has been objected that both parties being in *pari delicto*, the law ought to favor neither. The parties, however, do not stand upon an equality, one has the power to dictate, the other no alternative but to submit. Cockburn, Ch. J., in *Atkinson v. Denby*, *supra*.

Nor does it make any difference that the security was given after the composition was executed, if it was a part of the agreement upon which the composition was based. *Carroll v. Smith*, 4 E. D. Smith, 466; *Way v. Langley*, 15 Ohio St. 392; *Paterson v. Boehm*, 4 Penn. St. 537.

Where after the making of a composition agreement, and the

payment and distribution of the money and notes in pursuance of the agreement, the debtor voluntarily executes to one of his creditors other notes for the balance of his indebtedness, which by their terms become due before the composition notes, the notes so given for the balance are void, as being in fraud of the rights of other composition creditors. *Way v. Langley*, 15 Ohio St. 392.

§ 421. *New promise*.—In *Stafford v. Bacon* (1 Hill, 532; s. c. 2 Id. 353, reported erroneously in 25 Wend. 384), it was held that where a debt has been discharged by an accord and satisfaction, there remains no moral obligation to pay the balance which will support a new promise. The question was raised but not passed upon in *Craus v. Hunter* (28 N. Y. 339, 394).

The prevailing doctrine appears to be that a moral obligation to pay money, is a good consideration only in cases where the original right of action is extinguished by some rule of law, and not in cases where it is extinguished by the act of the parties. *Warren v. Whitney*, 24 Me. 561; *Shepard v. Rhodes*, 7 R. I. 470; *Suevily v. Read*, 9 Watts (Pa.) 396; *Montgomery v. Lampton*, 3 Met. (Ky.) 519; 1 Pars. on Cont. 434; but see *Goulding v. Davidson*, 26 N. Y. 604.

APPENDIX OF FORMS.

APPENDIX OF FORMS.

FORMS IN PROCEEDINGS UNDER THE TWO-THIRD ACT.

(Chapters II, III & IV.)

No. 1.

PETITION FOR DISCHARGE FROM DEBTS.

(See § 14.)

To the Honorable _____, *Justice of the Supreme Court*
[or, other officer having jurisdiction. *Ante*, § 26.]

The petition of _____, an insolvent debtor, and an inhabitant, now actually residing within the city and county of New York [or, other place], and others, whose names are hereunto subscribed, creditors of the said insolvent, residing within the United States, respectfully shows: That the said _____, by reason of many unforeseen circumstances, has become insolvent, and wholly unable to pay his debts, and that your petitioners, who are creditors of said insolvent, have debts in good faith owing to them by the said insolvent, now due or hereafter to become due, and amounting to at least two-thirds of all the debts owing by the said insolvent to creditors residing within the United States; Wherefore, said insolvent and your other petitioners are desirous that the estate of said insolvent should be distributed among his creditors in payment of their debts, so far as the same will extend, and for that purpose pray that all his estate, real and personal, may be assigned and delivered to _____, of, &c., as assignee nominated by the said creditors, and further, that the said _____ may be discharged from his debts in the manner authorized by the statutes of this State concerning voluntary assignments made pursuant to the application of an insolvent and his creditors.

A. B. \$
C. D. \$
E., F. & Co. \$

[Insert opposite each signature the amount due to the creditor.]

[If the creditor has in his own name, or in trust for him, any mortgage, judgment, or other security, or assignment by way of security, for securing the payment of his demand. Then add to his signature the following: And the mortgage (*or*, judgment; *or*, other security, as the case may be, describing it), held by me as security for the said debt, which mortgage is dated on, &c., and was executed by to , is hereby relinquished to the assignee to be appointed in this proceeding for the benefit of all the creditors of the said insolvent. See § 21.]

No. 2.

Affidavit of Residence of Insolvent to be Annexed to Petition.

(See § 32.)

CITY AND COUNTY OF NEW YORK, ss.

I, , of said city and county, do swear that in the annexed petition named, is an inhabitant actually residing within the city and county and State of New York.

Sworn to before me, this }
day of , 18 . }

 , *Notary Public*,

[*or*, other officer authorized to take affidavits.]

No. 3.

AFFIDAVIT OF CREDITOR TO BE ANNEXED TO PETITION.

(See § 23.)

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

 , of said city and county, one of the petitioning creditors of , an insolvent debtor, being duly sworn, says: That the sum of dollars, lawful money of the United States, being the sum affixed to the name of this deponent, subscribed to the petition annexed hereto, is justly due to him [*or*, will become due to him on the day of , 18], from said insolvent, for [*or*, on a promissory note given for] goods, wares and merchandise sold and delivered by him to the said insolvent [*or*, as the fact may be, setting out the nature of the demand, and whether arising on any written security or otherwise, and the general ground and consideration of the indebtedness], and that neither this deponent, nor any person to his use, has received from said insolvent, or from

any other person, payment of any demand, or any part thereof, in money, or in any other way whatever, or any gift or reward whatever, upon any express or implied trust or confidence that he should become a petitioner for the said insolvent.

Sworn to.

No. 4.

LIKE AFFIDAVIT OF CREDITOR WHO IS A MEMBER OF A FIRM.

(See § 23.)

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

of said city and county, one of the members of the firm or copartnership of _____, and who, as one of the copartners, and in their behalf, has subscribed to the petition the name or firm of their said copartnership as petitioning creditors of _____, an insolvent debtor, being duly sworn, doth depose and say: That the sum of _____ dollars, lawful moneys of the United States, being the sum annexed to the name of the said copartnership subscribed to the petition annexed hereto, is justly due [or, will become due on the day of _____, 18 ____] to the said copartnership from said insolvent for [or, on a promissory note given for] goods, wares and merchandise sold and delivered by them to said insolvent [or, as the facts may be, setting out the nature of the demand, and whether arising on any written security or otherwise, and the general ground and consideration of the indebtedness], and that neither this deponent nor any member of said firm, nor any person to his or their use, has received from said insolvent or any other person, payment of any demand or any part thereof in money, or in any other way whatever, or any gift or reward whatsoever, upon any express or implied trust or confidence that he or they should become a petitioner or petitioners for the said insolvent.

Sworn, &c.

No. 5.

SCHEDULE OF CREDITORS.

(See § 24.)

A full and true account of all the creditors of _____, an insolvent debtor, with the place of residence of each; the sum owing to each of them by the said insolvent; the nature of

each debt or demand, with the true cause and consideration thereof, and the place where the same accrued.

Creditors.	Residence.	Dolls.	Cts.	Nature of debt, with the true cause and consideration thereof, and whether arising on written security, on account, or otherwise.	Accrued at	Statement of any existing judgment, mortgage, or collateral or other security for the payment of any such debt.

Inventory of Property (being part of Schedule, and to be annexed thereto.)

A full and true inventory of all the estate, both real and personal, in law and equity, of _____, an insolvent debtor, of the incumbrances existing thereon, and of all the books, vouchers and securities relating thereto.

[Insert them.]

No. 6.

INSOLVENT AFFIDAVIT.

(See § 31.)

CITY AND COUNTY OF NEW YORK, ss.:

I, _____, do swear [*or*, affirm, as the case may be], that the account of my creditors and the inventory of my estate, which are annexed to my petition and herewith delivered, are in all respects just and true, and that I have not at any time, or in any manner whatsoever, disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors, and that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owed, and that I have not paid, secured to be paid, or in any way compound with any of my creditors, with a view fraudulently to obtain the prayer of my petition.

Sworn to before me this _____ }
day of _____, 18 ____ . }

[To be verified before the officer to whom the petition is presented.]

No. 7.**AFFIDAVIT OF NAMES AND RESIDENCE OF CREDITORS.**

(See § 38.)

CITY AND COUNTY OF NEW YORK, ss. :

The above-named insolvent, being duly sworn, says that the places of residence of the creditors of this deponent residing in the United States, where such place of residence is known to deponent, are as follows, that is to say :

*Names of Creditors.**Places of Residence.*

Subscribed and sworn, &c.

No. 8.**ORDER TO SHOW CAUSE.**

(See § 33.)

Upon reading the petition of _____, and creditors of _____, an insolvent debtor, and the schedule and affidavit annexed thereto, it is ordered that all the creditors of the said _____ show cause, if any they have, before me,¹ on the _____ day of next _____, at _____ o'clock in the _____ noon, at the chambers of the _____ Court in the _____, New York [or other place], why an assignment of the said insolvent's estate should not be made, and he be discharged from his debts pursuant to the provisions of the statute for the discharge of an insolvent from his debts, notice of which is to be published for six weeks [or, ten weeks, as the case may be²], in the State paper and in the newspaper printed in the city [or, village] of _____, entitled the [name the newspaper; add also if necessary], and also in the newspaper printed in the city of New York, entitled the Daily Register.³ And I do hereby further direct that notice of this order be served, either in person or by letter, on each of the creditors of the said insolvent residing in the United States, and whose place of residence is known to the said insolvent.⁴ And the service of the notice of this order shall be made on each of the said creditors

¹ See *ante*, § 34. If the officer making the order be a judge of a county court, and not of the degree of counsellor at law, the order should require cause to be shown at the term of the court to be held next after the expiration of the time of publication of the notice thereof. And the order should specify the time and place at which the term will be held.

² *Ante*, § 36.³ *Ante*, § 35.⁴ *Ante*, § 38.

in person or by letter addressed to him by mail at his known and usual place of residence. And if such service shall be personal then it shall be at least twenty days, and if by mail then forty days before the said day of next.

Dated

[*Judge's signature.*]

No. 9.

NOTICE TO CREDITORS.

(See § 38.)

To [name of creditor].

You will please take notice that on the day of 18 , an order was granted by the Honorable , Justice of the Court [*or*, county judge, as the case may be], on the petition of , of , an insolvent debtor, and so many of his creditors residing within the United States, whose debts amounted to at least two-thirds of all the debts owing by the said to creditors residing within the United States, requiring all the creditors of the said to show cause before him at the chambers of the Court in the , New York [*or* other place], on the day of , 18 , at o'clock in the noon of that day, why an assignment of the estate of the said should not be made, and he be discharged from his debts [and from the debts of , of which he was a member], pursuant to the provisions of the third article of title first of chapter fifth of part two of the Revised Statutes.

, *Insolvent.*

Dated,

No. 10.

NOTICE TO BE PUBLISHED.

(See § 39.)

Notice of application for the discharge of an insolvent from his debts pursuant to the provisions of article third, of title first, chapter fifth, of the second part of the Revised Statutes, , applicant. Notice first published on the day of , 18 . Creditors are required to appear before , Justice of the Court [*or*, other officer], at the chambers of the Court in the , New York, on the day of , 18 , at o'clock, A. M.

Dated,

No. 11.**AFFIDAVIT OF SERVICE OF NOTICE.**

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

, of said city and county, being duly sworn says, that on the day of , 18 , he served upon , , and , and each and every of them, a copy of the annexed notice to creditors, by delivering to the said persons, and each and every of them, personally, a true copy of said notice.

[If the service was by depositing in the post office, say:] That on the day of , 18 , he served upon , a copy of the annexed notice to creditors, by depositing a true copy thereof in the United States post office in the city of New York [*or*, other place], properly folded and directed to said , at his place of residence, to wit, at , and paying the postage of the same.

Sworn, &c.

No. 12.**AFFIDAVIT OF PUBLICATION OF NOTICE TO CREDITORS.**

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

, of said city, being duly sworn, says: That he is and during the whole time hereinafter mentioned has been, the printer [*or*, foreman, *or*, principal clerk of the printer], of the , a newspaper printed in said city and county, and that the annexed printed notice to creditors was published in the said newspaper six [*or*, ten] weeks successively, at least once in each week. Which publication commenced on the day of , 18 , and terminated on the day of , 18 .

Sworn, &c.

No. 13.**DEMAND OF A JURY AND SPECIFICATIONS OF OBJECTIONS.**

(See § 45.)

*In the matter of the application of**to be discharged from his debts.*

To _____, Justice of the _____ Court [or, other officer
]:

I, _____, one of the creditors of the said _____, do hereby object to the discharge of said _____ as an insolvent debtor, and demand that the case of the said _____, returnable before you this day, be heard and determined by a jury. And I do hereby specify the following grounds of my objections to such discharge:

1. That the petition herein is not signed by so many of the creditors of the said _____, residing within the United States, as have debts in good faith owing to them by such debtor, then due or thereafter to become due, and amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States.

2. That the said _____, in order to obtain his discharge, has procured _____, one of the persons signing his petition herein, to become a petitioning creditor for the sum of _____ dollars and upwards, not due to him from the said _____.

3. That [&c., setting out any other objections in detail which the creditor may have].

Sworn, &c.

Dated,

No. 14.**Demand for Jury and Specifications of Objections. Order Thereupon.**

(See § 45.)

_____, one of the creditors of _____, an insolvent debtor, having demanded that the case of the said insolvent be heard and determined by a jury, and having filed with me [or, the clerk of this court] a specification in writing of the grounds of his objections to the discharge of said _____ as an insolvent debtor, It is ordered that the case of the said insolvent be heard and determined by a jury.

No. 15.**SUMMONS FOR JURY.**

(See § 45.)

The people of the State of New York, to the sheriff of the county of _____, or to any one of the constables of the county of _____, or marshal of the city of _____, in the county of _____, greeting :

Whereas, on the _____ day of _____, 18____, on the application of _____, an insolvent debtor, I issued an order that the creditors of the said _____ show cause before me, on the _____ day of _____, 18____, why an assignment of the estate should not be made and he be discharged from his debts, pursuant to the provisions of chapter five of part second of the Revised Statutes. And whereas, on the return day of such order, _____, one of the creditors of the said insolvent, objected to such discharge, setting forth in writing the grounds of his objections thereto, and demanded that the case of the said insolvent should be heard and determined by a jury. I have therefore nominated eighteen reputable freeholders of the county of _____, to form a jury for the purpose of hearing and determining the case of the said insolvent, whose names are as follows : [Insert names of jurors.]

You are therefore hereby commanded to summon the persons so nominated by me, to appear before me at [insert place of hearing], on the _____ day of _____, 18____, at o'clock, _____ M., for the purpose of hearing and determining the said case.

Witness my hand, this _____ day of _____, 18____.

No. 16.**ORDER FOR ASSIGNMENT.**

(See § 50.)

Whereas _____, an insolvent debtor, did, in conjunction with so many of his creditors residing within the United States, as have debts in good faith owing to them by the said insolvent, amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States, present a petition to me for the purpose of being discharged from his debts pursuant to the provisions of the third article of the first title of the fifth chapter of the second part of the Revised Statutes, and the said insolvent having at the same time therewith presented a schedule and inventory as required by law, and having taken and subscribed before me the affidavit required by law,

and I having thereupon made an order requiring the creditors of the said insolvent to show cause before me on the day of , 187 , at the chambers of the court at the court house, New York city, why an assignment of said insolvent's estate should not be made, and he be discharged from his debts, and directing that notice of said order should be given as by statute prescribed, and due proof of the publication and service of said notice having been made before me, and it appearing satisfactorily to me that the said insolvent is justly and truly indebted to the petitioning creditors in the sums by them respectively mentioned in their affidavits annexed to the petition; that such sums amount in the aggregate to two-thirds of all the debts owing by him at the time of presenting his petition to creditors residing within the United States, and that he has honestly and fairly given a true account of his estate, and has in all things conformed to the matters required of him by said article, I do therefore direct that an assignment be made by said insolvent to , assignee nominated by the said creditors, of all his estate both in law and equity, in possession, reversion or remainder, excepting from the articles mentioned in his inventory [such articles of wearing apparel and bedding as in the opinion of the officer are reasonably necessary for such insolvent and his family to retain], also the arms and accoutrements required by law to be provided by any citizen enrolled in the militia.

No. 17.

ASSIGNMENT.

(See §§ 50-53.)

Know all men by these presents, that I, an insolvent debtor, did in conjunction with so many of my creditors residing within the United States, whose debts in good faith amount to two-thirds of all the debts owing by me to creditors, residing within the United States, present a petition to , Justice of the Court [*or*, other officer], praying for relief pursuant to the provisions of the statute authorizing an insolvent debtor to be discharged from his debts. Whereupon the said justice ordered notice to be given to all my creditors to show cause, if any, they had before him at a certain day and place, why the prayer of the said petition should not be granted, which notice was duly published and served as required by law, and no good cause appearing to the contrary, and the said justice being satisfied that I have in all things conformed to those matters required by the said statute, has directed an assignment of all my estate to be made by me for the benefit of all my creditors.

Now therefore, know ye, That in conformity to to the said direction I have granted, released, assigned and set over and by these presents, do grant, release, assign and set over unto of, &c., assignee nominated to receive the same, all my estate real and personal, both in law and equity in possession, reversion or remainder, and all books, vouchers and securities relating thereto, to hold the same assignee to and for the use of all my creditors [if necessary, except from the assignment, such article of wearing apparel and bedding as in the opinion of the officer shall be reasonable and necessary for the insolvent and his family to retain, also all arms and accoutrements required by law].

In witness whereof, I have hereunto set my hand and seal, this day of , in the year one thousand eight hundred and

Sealed and delivered in }
the presence of . }

[Add acknowledgment or proof of execution.]

No. 18.

ASSIGNEE'S CERTIFICATE.

(See § 54.)

I, , of, &c., do hereby certify that , an insolvent debtor, has this day granted, conveyed, assigned and delivered to me for the use of and benefit of all his creditors, all his estate real and personal, both in law and equity, in possession, reversion or remainder, and all books, vouchers and securities relating to the same, except such articles of wearing apparel and bedding as are reasonable and necessary for the said insolvent and his family to retain, and also his arms and accoutrements.

In witness whereof, I have hereunto set my hand and seal, this day of , in the year one thousand eight hundred and

[Executed in presence of the officer or two witnesses.]

No. 19.

Clerk's Certificate of Recording of Assignment.

(See § 54.)

I, , clerk of the county of , do hereby certify that an assignment of all the estate, real and personal, both in law and equity, in possession, reversion and remainder, and all books, vouchers, securities relating thereto, of , an in-

solvent debtor, made by the said , to , to and for the use of the creditors of the said , and dated the day of , 18 , was duly recorded in the clerk's office of said county on the day of , 18 .

In witness thereof, I have thereunto subscribed my name and affixed my official seal, this day of , 18 .

No. 20.

ASSIGNEE'S OATH OF OFFICE.

(See § 290.)

I, , having been appointed assignee of , an insolvent debtor, do swear [*or, affirm*], that I will well and truly execute the trust by that appointment reposed in me, according to the best of my skill and understanding.

Sworn to, &c.

No. 21.

DISCHARGE.

(See §§ 54-74.)

To all to whom these presents may come or may concern.
I, , Justice of the Court of the
[*or, other officer*], send greeting:

Whereas, , an insolvent debtor residing within the city and county of New York [*or, other place*], did, in conjunction with so many of his creditors residing within the United States as have debts in good faith owing to them by the said insolvent, amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States, present a petition to me, praying that the estate of the said insolvent might be assigned for the benefit of his creditors, and he be discharged from his debts pursuant to the statute authorizing an insolvent debtor to be discharged from his debts, and the said insolvent having at the same time therewith presented a schedule and inventory as required by law, and having taken and subscribed the affidavit required by law, which was duly certified by me. Whereupon, I ordered notice to be given as required by the law to all the creditors of the same insolvent, to show cause, if any, they had before me at a certain time and place, why an assignment of the said insolvent estate should not be made and he discharged from his debts, proof of the service whereof on such of the creditors of said insolvent, whose places of residences are known to the insolvent as required by

law, and of the publication whereof hath been duly made. And whereas, it satisfactorily appearing to me that the proceedings on the part of the creditors are just and fair, and that the said insolvent has conformed in all things to those matters required of him by the said statute. I directed an assignment to be made by the said insolvent, of all his estate real and personal, both in law and equity, in possession, reversion or remainder, to _____, assignee, nominated by the creditors to receive the same, and the said insolvent having on the _____ day of _____, 18____, made such an assignment, and produced to me a certificate thereof executed by the said assignee, and duly proved, and also a certificate of the clerk of said county of _____, that such an assignment is duly recorded in his office. Now, therefore, know ye, that by virtue of the power and authority in me vested, I do hereby discharge the said insolvent from all his debts, and from imprisonment pursuant to the provisions of the said statute.

In witness whereof I have hereunto set my hand, the _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

_____, Justice of the _____ Court.

FORMS IN PROCEEDINGS FOR EXONERATION OF INSOLVENT FROM IMPRISONMENT.

(Chapter VI.)

No. 22.

Petition of Insolvent to obtain Exoneration from Arrest and Discharge from Imprisonment.

(See § 104.)

Before Hon.

<i>In the Matter of</i> J. W., <i>an insolvent debtor, &c.</i>	}
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To the Honorable _____, *Judge of the* _____ *Court.*

The petition of J. W. respectfully shows that he is a resident and inhabitant of _____, county of _____, (or that he is imprisoned in the jail of the county of _____, under process in [one *or* more] civil actions,) that your petitioner is unable to pay his debts due to his several creditors, and therefore prays that your petitioner's estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment by reason of any debts arising upon contracts previously made, and that he may be discharged from his imprisonment, and for such relief as he may be entitled to pursuant to the provisions of article five, of title 1, of chapter 5, of part 2 of Revised Statutes, entitled of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment.

CITY AND COUNTY OF NEW YORK, ss.:

J. W., being duly sworn, doth depose and say that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that all the facts therein are true of his own knowledge.

J. W.

Sworn before me, &c.,

No. 23.**SCHEDULE AND INVENTORY.**

(See § 105.)

[The form is the same as that under the Two-third Act.
See Form No. 5.]

No. 24.**OATH.**

(See § 105.)

J. W., petitioner in the foregoing petition named, do swear that the account of my creditors, with the places of their residences and the inventory of my estate, with the evidences of my title thereto, which are herewith delivered, are in all respects just and true, and that I have not at any time or in any manner whatsoever, disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors, and that I have not paid, secured to be paid, or in any way compounded with any of my creditors with a view that they or any of them should abstain or desist from opposing my discharge.

Subscribed and sworn to before }
me, this day of 187 . }

[Must be verified before and certified by the officer to whom the petition is presented.]

No. 25.**ORDER TO SHOW CAUSE.**

(See § 106.)

*Before Hon.**&c.**In the Matter of**J. W.,**an insolvent debtor, &c.*

Upon reading the petition of J. W., verified on the
day of , 187 , and the schedules and inventory thereto

annexed, and the affidavit of said insolvent, taken and subscribed before me as required by law,

It is Ordered, That all the creditors of said [insolvent] show cause, if any they have, before me , on the day of , 187 , at o'clock, A. M., at the chambers of the court, at the county court house in the city of New York, why the prayer of said petitioner should not be granted, and that notice of this order be published once in each week for six [or, ten weeks, as the case may be] successively, in the State paper, and in the Daily Register, a newspaper published in the city of New York.

Dated,

No. 26.

ORDER FOR ASSIGNMENT.

(See § 110.)

Before Hon.

In the Matter of

J. W.,

an insolvent debtor, &c.

Whereas J. W., an insolvent debtor, did, on the day of , 187 , present a petition to me, dated on the day of , 187 , praying that his estate might be assigned for the benefit of all his creditors, and that his person might thereafter be exempt from arrest or imprisonment by reason of any debts arising upon contracts previously made, and that he might be discharged from imprisonment, and the said insolvent having at the same time therewith presented a schedule and inventory as required by law, and having taken and subscribed before me the affidavit required by law, which was duly certified by me, and I having thereupon made an order requiring the creditors of said insolvent to show cause before me on the day of 187 , at the chambers of the court, at the county court house, New York city, why the prayer of said petitioner should not be granted, and directing that notice of said order should be given as by statute prescribed, and due proof of the publication of said notice having been made before me, and it appearing satisfactorily to me that said petitioner is unable to pay his debts, that his account and inventory presented with his petition are true, that he has not been guilty of

any fraud or concealment in violation of the provisions of the said article, but has in all things conformed thereto.

I do, therefore, direct that an assignment be made by the said [insolvent debtor], to E. H., of the city of New York, hereby appointed assignee by me, of all the estate of said debtor, except such articles as are by law exempt from execution.

Dated,

[Signed.]

No. 27.

ASSIGNMENT.

(See § 110.)

Know all men by these presents, That I, J. W., having become insolvent, and being also an imprisoned debtor, did present a petition to the Hon. _____, one of the judges of the Court of Common Pleas, in and for the city and county of New York, praying that my estate be assigned for the benefit of all my creditors, and that my person be thereafter exempted from arrest or imprisonment by reason of any debts arising upon contracts previously made, and that I be discharged from imprisonment, and for relief pursuant to the provisions of the fifth article, of the first title, of the fifth chapter, of the second part, of the Revised Statutes of the State of New York, authorizing an insolvent debtor to be discharged from imprisonment, and exonerating his person therefrom. Whereupon the same judge did make an order requiring my creditors to show cause, if any they had, before him, or one of the other judges of said court, at a time and place specified in said order, why the prayer of the petitioner should not be granted, which notice was duly published; and upon hearing on said petition no good cause appearing to the contrary, and it satisfactorily appearing to the Hon. _____, before whom the hearing was had, that I am and was unable to pay my debts, that my accounts and inventory presented with my petition are true, that I have not been guilty of any fraud or concealment in violation of the provisions of said article, but have in all things conformed thereto, directed an assignment of all my estate, except such articles as are exempt from execution, to be made by me for the benefit of all my creditors, and did appoint E. H., of the city of New York, such assignee:

Now, therefore, know ye, That, in conformity to the said direction, I have granted, released, assigned and set over, and by these presents do grant, release, assign and set over, unto

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

On this day of , 18 , before me personally came J. W., to me known to be the person described in, and who executed the foregoing assignment, and acknowledged to me that he executed the same for the uses and purposes therein mentioned.

C. P. D.

No. 30.

CERTIFICATE OF COUNTY CLERK.

(See § 111.)

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

I, _____, clerk of the city and county of New York,
do hereby certify that the foregoing assignment of J. W.
was, on the _____ day of _____, 187____, duly recorded in
my office in a book kept for that purpose.

Witness, my hand and seal, this day of , 187 .

Clerk of the City and County of New York.

No. 31.

DISCHARGE.

(See § 111.)

Before the Hon. _____, etc.

In the Matter of
etc.

*To all to whom these presents shall come or may concern, greet-
ing:*

Whereas, J. W., an insolvent and imprisoned debtor, did, on the _____ day of _____, 187____, present to me, _____, one of the judges of the Court of Common Pleas, in and for the city and county of New York, praying that the petitioners' estate might be assigned for the benefit of all his creditors, and that his person might be thereafter exempted from arrest or imprisonment, by reason of any debts arising upon contracts previously made, and that he be discharged from imprisonment, and for such further or other relief as he may be

entitled to pursuant to the provisions of article 5, title 1, chapter 5, part 2, of the Revised Statutes of the State of New York, entitled "Of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment;" and the said judge having thereupon ordered notice to be given as required by law, and required the creditors of said insolvent to show cause, if any they had, before him, or, in his absence, before one of the other judges of the said court, at a time and place specified in said order, why the prayer of said petitioner should not be granted, which notice was duly published, and proof of the publication thereof duly made; and

Whereas, upon hearing on said petition, no good cause appearing to the contrary, I, _____, one of the judges of the Court of Common Pleas, in and for the city and county of New York, before whom the hearing was had, being satisfied that the said petitioner is and was unable to pay his debts, that his accounts and inventory presented with his petition are true, that he has not been guilty of any fraud or concealment in violation of the provisions of the said fifth article, but has in all things conformed thereto, did direct that an assignment be made by the said insolvent and imprisoned debtor of all his estate, excepting such articles as are exempt by law from execution, for the benefit of all his creditors, and did appoint E. H., of the city and county of New York, such assignee; and the said insolvent and imprisoned debtor having, on the day of _____, 187____, executed such assignment, and produced to me a certificate thereof, and of the delivery of the property assigned, or so much thereof as was capable of delivery, with the books and papers relating to the same, which certificate was duly executed by the said assignee and duly proved, and also a certificate of the clerk of the city and county of New York that such assignment has been duly recorded in his office:

Now, therefore, know ye, That, by virtue of the power and authority in me vested, I, _____, one of the judges of the Court of Common Pleas, in and for the city and county of New York, the officer before whom these proceedings were had, do hereby grant unto J. W., the said insolvent and imprisoned debtor, a discharge from imprisonment, pursuant to the provisions of said statute, and do hereby declare that the person of said insolvent shall forever hereafter be exempted from imprisonment, by reason of any debt due at the time of his making the said assignment, or contracted for before that time, though payable afterwards, and by reason of any liabilities incurred by him by making or indorsing any promissory note or bill of exchange, or incurred by him in consequence of the

payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior or subsequent to the execution of his aforesaid assignment.

In witness whereof, I have hereunto set my hand and affixed my seal, this day of , one thousand eight hundred and .

Filed and recorded the day of , 187 .

FORMS IN PROCEEDINGS UNDER THE "FOUR-TEEN DAY ACT."

(Chapter VII.)

No. 32.**Petition for Discharge from Imprisonment on Execution.**

(See § 118.)

To the [court from which process issued, or the county court.
§ 116].

The petition of _____, &c., shows to the court that he is a prisoner confined in the jail of the county of _____, on an execution against the person, issued out of this court in a civil action, wherein _____ is plaintiff and your petitioner is defendant, and in which action judgment was rendered against your petitioner for the sum of _____ dollars, on the _____ day of _____, 18 _____. That the said sum of _____ dollars is now due and unpaid on said execution. [If the imprisonment is for a sum exceeding five hundred dollars, add :] and that your petitioner has been imprisoned on said execution for more than three months. Your petitioner further shows that annexed hereto, marked as schedules A and B, is a just and true account of all his estate, real and personal, in law and equity, and of all charges affecting the same, both as such estate and charges existed at the time of his imprisonment and as they exist at the time of preparing this petition, together with a just and true account of all deeds, securities, books and writings whatsoever relating to said estate and the charges thereon, with the names and places of abode of the witnesses to such deeds, securities and writings. Your petitioner therefore prays that an order may be made, directing the sheriff of said county to bring your petitioner into court on a day assigned for that purpose, and that your petitioner may be discharged from his imprisonment on his compliance with the provisions of the statute, and that your petitioner may have such further or other relief as he may be entitled to under the provisions of the statute authorizing debtors imprisoned on execution in civil causes to be discharged from imprisonment.

Dated.

No. 33.**SCHEDULE A, REFERRED TO IN PETITION ABOVE.**

(See § 118.)

A just and true account of all the estate, real and personal, in law and equity, and of all charges affecting the same, of _____, an imprisoned debtor, as the same existed at the time of his imprisonment, as stated in said petition, together with a just and true account of all debts, securities, books, and writings whatsoever relating to said estate, and charges thereon, with the names and places of abode of the witnesses to such deeds, securities, and writings, according to the best of his knowledge, information and belief.

Real estate, as follows.....

Personal estate, as follows.....

Charges affecting said estate..... [State charges in full.]

Account of all deeds, securities, books and writings, relating to the said estate, and the charges thereon, and the names and places of abode of the witnesses to the same, as follows : [Set out the account in full.]

No. 34.**SCHEDULE B, REFERRED TO IN THE PETITION ANNEXED.**

(See § 118.)

Same form as schedule A, except in the place of the words "at the time of his imprisonment, as stated in said petition," insert the words "at the time of preparing the said petition."

No. 35.**AFFIDAVIT TO BE ENDORSED ON PETITION.**

(See § 119.)

COUNTY OF _____.

I, _____, the within named petitioner, do swear [*or, affirm*] that the within petition and account of my estate, and of the charges thereon, are in all respects just and true; and that I have not, at any time or in any manner, disposed of or made over any part of my property with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors.

Sworn to before me, this _____ }
day of _____, 18 ____ . }

_____, *Justice of* _____ *Court*
[*or, other officer holding court*].

No. 36.**NOTICE TO CREDITORS.**

(See § 117.)

SUPREME COURT.

[or, other court.]

*In the Matter of**an Imprisoned Debtor.*

, }
}

To

Sir :

Please to take notice, that I shall present to the Supreme Court [or, other court] at the next special term thereof, to be held at the court house at _____, in the county of _____, on the _____ day of _____, 18____, at ten o'clock in the forenoon, or as soon as counsel can be heard, the petition, together with the account annexed thereto, with copies whereof you are herewith served, and I shall then and there apply to the said court that the prayer of the said petition be granted.

Dated.

Yours.

No. 37.**ORDER TO BRING PRISONER BEFORE THE COURT.**

(See § 120.)

At a Special Term, &c.

The said _____, having presented his petition to this court, praying for an order directing the sheriff of the county of _____, to bring him, the said _____, into this court on a day assigned for that purpose, and that the said _____, be discharged from his imprisonment upon an execution issued out of this court in an action wherein _____ is plaintiff, and the said _____ defendant, and due proof being made to the court of the service upon the said _____ of a copy of said petition and the account annexed thereto, with the notice of the presentation of the same. It is ordered, that the sheriff of said county of _____ bring the said _____ before this court at the present special term thereof, now sitting at the court house in the village of _____, in said county, on the _____ day of _____, 18____, at ten o'clock in the forenoon of that day.

No. 38.**ORDER DIRECTING ASSIGNMENT.**

(See § 120.)

At a special term.

The said , having presented his petition to this court praying for an order directing the sheriff of the county of to bring here the said , into this court on a day assigned for that purpose, and that the said be discharged from his imprisonment upon an execution issued out of this court, in an action wherein is plaintiff, and the said is defendant. And the said order having been duly issued, and the said brought before the court in pursuance thereof, and the court having heard and determined the proofs and allegations of the parties, and being satisfied that the petition and accounts of the said are correct, and that his proceedings are just and fair. It is therefore, ordered, that an assignment be made by the said imprisoned debtor to , of, &c., who is hereby appointed assignee to receive the same of all the said debtor's property, except such articles as are exempt by law from levy and sale on execution.

No. 39.**ASSIGNMENT.**

(See § 123.)

Know all men by these presents, that I, J. P. L., being an imprisoned debtor, did, on the day of , 187 , present a petition to the Hon. Court of Common Pleas, in and for the city and county of New York [*or, other court, § 116*], pursuant to the provisions of article 6, title 1, chapter 5, part 2, of the Revised Statute of the State of New York, and at the time of such presentation did furnish due proof of a due and timely notice having been given, the creditors in said petition named their personal representative or attorney of the time and place of such petition, and I, having in open court subscribed and sworn to the oath indorsed upon the said petition, and the court having heard and examined the allegations and proofs, and no good cause appearing to the contrary, being satisfied that my petition and accounts are correct, and that the proceedings on my part are just and fair, did by an indorsement on said petition, order that my property, or so much thereof as may be sufficient to discharge the executions on which I am imprisoned, together with the jail fees thereon, except the articles exempt from execution be assigned to I.

B., of the city of New York, for the benefit of the execution creditors in said petition named.

Therefore, know ye, that in conformity to the said order, I have granted, released, assigned, transferred and set over, and by these presents do grant, release, transfer, assign and set over unto the said I. B., all my property, estate, real and personal, in law and equity, except the articles which are by law exempt from execution; to have and to hold the same unto the said I. B., his heirs, executors, administrators and assigns, forever, for the benefit of the creditors in said petition named.

In witness thereof, I have hereunto set my hand and seal, this day of , 18 .

Sealed and delivered }
in presence of }
C. S. S. }

J. P. L.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

On the day of , 187 , before me came J. P. L., to me known, and known to be the person described in, and who executed the foregoing assignment, and he acknowledged to me that he executed the same.

C. J. S.

Notary Public.

No. 40.

CERTIFICATE OF ASSIGNEE.

I, , duly appointed assignee of the property of , an imprisoned debtor, do hereby certify that the said has this day actually delivered to me all the property directed to be assigned to me by an order of the Court [or, other court], dated the day of , 18 .
Dated.

No. 41.

ORDER DISCHARGING PRISONER.

At a special term.

The said , having presented his petition to this court, praying for an order directing the sheriff of the county of to bring him the said , into this court on a day assigned for that purpose, and that the said be discharged from his imprisonment upon an execution issued out of the

said court in an action wherein was plaintiff, and the said was defendant. And the account required by law being annexed to said petition, and due notice of the presentation of said petition having been given, and a copy of said petition and account having been served, as required by law, and at the time of the presentation of said petition the affidavit required by law having been indorsed thereon and sworn to by the said . And the said order having been duly issued, and the said brought before the court in pursuance thereof, and the court having heard and determined the proofs and allegations of the parties, and being satisfied that the petition and account of the said are correct, and that his proceedings have been just and fair, and having thereupon made a further order directing an assignment to be made by the said , of all his property, except such articles as are exempt from execution, to , of, &c., who was appointed assignee to receive the same. And the said assignment having been duly made, and satisfactory evidence having been furnished to the court that the said property has been actually delivered to the said assignee [*or*, and security], approved by the court having been given by the said for future delivery of said property to said assignee. It is hereby ordered that the said be, and he is hereby discharged from his imprisonment, under and in pursuance of the execution aforesaid.

FORMS OF GENERAL ASSIGNMENTS, AND PROCEEDINGS THEREUNDER.

No. 42.

ASSIGNMENT BY INDIVIDUAL (WITHOUT PREFERENCES).

This indenture, made this day of , in the year , between of , party of the first part, and of , party of the second part, witnesseth that, whereas the party of the first part is indebted to divers persons in sundry sums of money which he is unable to pay in full, and is desirous of providing for the payment of the same so far as in his power, by an assignment of all his property for that purpose. Now, therefore, the said party of the first part, in consideration of the premises, and of the sum of

one dollar to him paid by the party of the second part, upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his heirs, executors, administrators and assigns all and singular, the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, debts, claims, demands, property and effects of every description belonging to the parties of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under execution, to have and to hold the same and every part thereof unto the said party of the second part, his heirs, executors, administrators and assigns. In trust, nevertheless, to take possession of the same, and to sell the same with all reasonable dispatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectable, and with and out of the proceeds of such sales and collections :

1. To pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust.*

2. To pay and discharge in full, if the residue of said proceeds are sufficient for that purpose, all the debts and liabilities now due or to grow due from the said party of the first part, with all interest money due or to grow due, and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.**

3. And if after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors, administrators and assigns. And in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part, his true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts, demands, due, owing and belonging to the said party of the second part, and to give acquittances and discharges for the same, to sue, prosecute, defend and im-

plead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances.

And the party of the first part does hereby authorize the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writing, whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said party of the first part, that he will faithfully and without delay execute the created trust according to the best of his skill, knowledge and ability.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered }
in presence of }

Seal.
Seal.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

On this day of , in the year of our Lord one thousand eight hundred and seventy , before me came , to me personally known, and known to me to be the persons described in, and who executed the above instrument, and each for himself severally acknowledged that he executed the same.

No. 43.

Assignment by Individual. Another Form with Schedules (without preferences).

Know all men by these presents, that I, of , in consideration of the sum of one dollar, to me in hand paid by , of , the receipt whereof I hereby acknowledge, and of the uses, purposes, and trusts hereinafter mentioned, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, unto the said , his heirs, executors, administrators and assigns, all my lands, tenements, and hereditaments, goods, chattels, and effects, and all accounts, debts and demands due, owing, or belonging to me, together with all securities for the same which said lands, goods, chattels, debts and demands are particularly enumerated and described in the schedules hereto annexed, marked Schedule A and Schedule B, to

have and to hold the same, with all the appurtenances, unto the said , his heirs, executors, administrators and assigns in trust, nevertheless the said , shall forthwith take possession of the property and premises hereby assigned, and with all reasonable diligence sell and dispose of the same by public or private sale, for the best price that can be obtained, and convert the same into money. And shall, as soon as possible, collect the debts, accounts, and demands as aforesaid; and with and out of the proceeds of such sales and collections, after deducting and paying all reasonable costs and charges, and expenses attending the execution of the trust hereby created, together with a reasonable and lawful compensation to the said , shall pay to each and every of my creditors the full sum that may be due and owing to them from me; and if the proceeds of the said sales and collections shall not be sufficient fully to pay and satisfy each and all of my creditors, then the said shall, with and out of the proceeds, pay the creditors ratably and in proportion to the amount due and owing to each. And if, after fully paying all the said creditors, there shall be any balance or residue left of the said proceeds, the said shall pay and return to me, , my executors, administrators and assigns. And in furtherance of the premises, I, the said , do hereby make, constitute and appoint the said my true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises, and to the full execution of the said trust and for the purposes aforesaid, to ask, demand, recover and receive of and from all and every person or persons, all the property, debts, and demands, due, owing, and belonging to me, and to give acquittances and discharges for the same; and in default of delivery or payment in the premises, to sue, prosecute and implead for the same, and to execute, acknowledge and deliver all necessary deeds and instruments of conveyance, and also for the purposes aforesaid, or any part thereof, to make, constitute, and appoint one or more attorneys under him, and at his pleasure to revoke the same, hereby ratifying and confirming whatever my said attorney or his substitutes shall lawfully do in the premises.

In witness whereof, I have hereunto set my hand and seal, the day of , in the year 18 .

Sealed and delivered in presence of {

[SEAL.]

I hereby accept the trust created by the above instrument, and covenant faithfully to perform the same.

Dated, New York,

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.:

On this day of , 18 , before me personally came , to me personally known, and known to me to be the persons described in and who executed the above instrument, and severally acknowledged that they executed the same.

No. 44.

Copartnership Assignment. Assignment by Copartners without Preference.

This indenture, made the day of , in the year of our Lord one thousand eight hundred and , between , of , and , of , who have hitherto composed the partnership of , hitherto doing business at , parties of the first part, and , of , party of the second part: Witnesseth, that whereas the said parties of the first part are justly indebted to sundry persons in divers and sundry sums of money, and being unable to pay the same in full, are desirous of making an equitable distribution of their property and effects among their creditors: Now, therefore,

First. The parties of the first part, in consideration of the premises, and the sum of one dollar to them in hand respectively paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, delivered and conveyed, and by these presents do grant, bargain, sell, assign, deliver over and convey unto the party of the second part, his heirs, executors, administrators and assigns, all and singular the estate and property, real and personal, of every kind and nature, and wheresoever the same may be, of the said parties of the first part, which is held or owned by them as such copartnership firm as aforesaid. To have and to hold the same and every part and parcel thereof, with the appurtenances, to said party of the second part, his heirs, executors, administrators and assigns.

In trust, nevertheless, for the following uses and purposes:

Second. The said party of the second part shall forthwith take possession of all and singular the estate, property and effects hereby above assigned, transferred and conveyed, and set over, or intended so to be, and shall, with all reasonable diligence, sell and dispose of the same, and convert the same into money; and shall collect any and all bills, promissory notes, bonds, accounts, choses in action, claims, demands, and money due or owing the said parties of the first part as such copartnership, so far as the same shall prove collectable.

Third. Out of the proceeds of such sales, collections, and estate and property, the said party of the second part is authorized to pay and retain all reasonable costs, charges, and expenses of making, executing, and carrying into effect this assignment in this behalf, including a reasonable compensation to the party of the second part for his services in executing and carrying out the trust created in this behalf in this assignment.

Fourth. That the said party of the second part is directed to pay out of the residue of the said proceeds of such sales, collections, estate and property, if these should be sufficient therefor, to each and every of the creditors of the said parties of the first part, as such partnership or firm, the full sum that may be justly due and owing to them respectively from such partnership or firm, without any priority or preference whatsoever; and if the proceeds of such sales and collections, estates and property, shall not be sufficient to pay and satisfy the debts of each and all of the creditors of the said partnership or firm in full, then the said party of the second part is directed, out of the proceeds to pay the said creditors ratably and in proportion to the amount due and owing to each of them respectively.

Fifth. With and out of the residue and remainder of the said proceeds, if any shall remain after paying all the copartnership debts, the party of the second part is directed to pay and discharge all the private and individual debts of the parties of the first part, or either of them, whether due or to grow due, provided the respective amounts of the individual debts of each of said parties does not exceed his portion of the surplus that may remain after paying all the partnership debts; and if it should, then his interest in said surplus is to be divided *pro rata* among his individual creditors in proportion to their respective demands. It being understood that no part of the said surplus which will belong to each of said individual parties of the first part respectively after the payment of the copartnership debts, is to be made liable for the individual debts of the other of them.

Sixth. And whereas the said parties of the first part are respectively justly indebted to sundry persons in divers and sundry sums of money, and are respectively unable to pay the same in full, and are respectively desirous of making an equitable distribution of their property and effects among their creditors, now therefore,

Seventh. The parties of the first part in consideration of the premises, and of the sum of one dollar to each of them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have respectively granted, bargained, sold, assigned, delivered over and conveyed, and by these presents do respectively grant, bargain, sell, assign, de-

liver over and convey unto the party of the second part, his heirs, executors, administrators and assigns all and singular, the estate and property, real and personal, of every kind and nature, and wheresoever the same may be of the said parties of the first part, which is held and owned by them respectively as their separate and individual property, to have and to hold the same and every part and parcel thereof with the appurtenances, to the party of the second part, his heirs, executors, administrators and assigns, in trust, nevertheless to and for the following uses and purposes.

Eighth. The party of the second part shall forthwith take possession of all and singular the estate, property and effects hereby lastly above assigned and conveyed or intended so to be, and shall with all reasonable diligence sell and dispose of the same, and convert the same into money, and shall collect any and all claims of every kind and nature hereby lastly above assigned, due or owing to the parties of the first part respectively, so far as the same shall prove collectable.

Ninth. Out of the estate, property and claims hereby lastly above assigned, or the proceeds thereof, the said party of the second part is authorized to pay and retain all reasonable costs, charges and expenses of carrying into effect this assignment in this behalf, including all reasonable compensation to the party of the second part, for his services in executing and carrying out this trust in this behalf by this instrument.

Tenth. The party of the second part is directed, out of the residue and remainder of said estate, property and proceeds, to pay and discharge all the private and individual debts of the parties of the first part, or either of them, whether due or to grow due, as follows: To apply and devote the estate, property and proceeds belonging to each of the said parties of the first part, respectively to the payment of his individual debts, so that no part of the estate, property or effects belonging to either of the parties of the first part, individually, shall be devoted or appropriated to the payment of the individual debts of the other of them.

Eleventh. If the individual estate or property of either or any of the parties of the first part shall be insufficient to pay his individual debts in full, then the party of the second part is directed to apply the same to the payment and liquidation of said debts ratably share and share alike according to their respective amounts so far as the same will extend for the purpose.

Twelfth. If the individual property and estate of the parties of the first part, or any or either of them, shall be more than sufficient to pay their respective individual debts and lia-

bilities, then any surplus that may remain is to be applied by the party of the second part to the payment and liquidation of any of the partnership debts or any balance thereof which may remain unpaid out of the aforesaid partnership property and effects, said surplus to be applied to the payment and liquidation of said partnership debts, ratably share and share alike according to their respective amounts.

Thirteenth. The parties of the first part hereby except from the foregoing assignment, and from the effect thereof, all such property as is by the laws of the United States of America, or otherwise, exempt to them, or any or either of them, from levy and sale under execution, or otherwise, for payment of debts.

Fourteenth. If any surplus shall remain of the property and estate hereby assigned, after the payment of all the just debts owing by the parties of the first part, or either of them, the party of the second part shall return the same to the parties of the first part, their executors, administrators, or assigns, according to their respective rights thereto. And in furtherance of the premises the said parties of the first part do hereby make, constitute and appoint the said party of the second part their true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons, all property, debts and demands due, owing and belonging to the said parties of the first part, or each or any of them, and to give acquittances and discharges for the same, to sue, prosecute defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said parties of the first part do hereby authorize the party of the second part to sign the copartnership name of the parties of the first part to any check, draft, promissory note or other instrument in writing for the payment of moneys, which is payable to the order of the parties of the first part in their copartnership name.

And to sign the copartnership name to any instrument in writing of any name, kind or nature which may be necessary to more fully carry into effect the object, design and purpose of this trust: And the said parties of the first part respectively in their individual capacities do hereby make, constitute and appoint the party of the second part the attorney of each and every of them, and do hereby authorize him to sign the name of each or any of them to any check, draft, promissory note or other instrument in writing which is payable to the order of

each or any of the parties of the first part, or to sign the name of each or any of the parties of the first part to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said parties of the first part that he will faithfully and without delay execute the trust created according to the best of his skill, knowledge and ability.

In witness whereof, the parties to these presents have hereunto set their hands and seal the day and year first above written.

[Acknowledgment as in Form 42.]

No. 45.

ASSIGNMENT BY COPARTNERSHIP (SHORTER FORM).

This indenture, made and entered into this day of , in the year one thousand eight hundred and seventy , by and between of and of , co-partners doing business in the city of New York under the firm name of , parties of the first part witnesseth that whereas the said parties of the first part are insolvent and unable to pay their debts in full or at maturity, and are desirous of providing for their payment by assigning all their property for that purpose: Now, therefore, the said parties of the first part in consideration of the premises, and of one dollar to each of them in hand paid by the said party of the second part, have granted, conveyed, bargained, sold, assigned, transferred and set over, and by these presents do grant, convey, bargain, sell, assign, transfer and set over unto the said party of the second part all and singular their copartnership and individual estate real and personal, goods, chattels, effects, credits, choses in action and property of every name and kind, whether held by and in the name of said parties of the first part, and each and either of them, or by and in the name of any other person for them, except such property, if any, held or owned by said parties of the first part separately and individually, as is exempt by law from levy and sale under execution, to have and to hold the same and every part thereof unto the said party of the second part, his heirs, executors, administrators and assigns, in trust, however, to take possession of the same and to sell the same with all reasonable dispatch and convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectable, and with and out of the proceeds of such sales and collections.

1. To pay and discharge all the just and reasonable expenses, costs and charges of executing the assignment, and of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust.

2. With and out of the net proceeds of the separate and individual property of each of the said parties of the first part to pay in full his separate and individual debts and liabilities. If the net proceeds of the separate and individual property of each or either of the said parties of the first part is insufficient to pay his separate and individual debts and liabilities in full, then the proceeds of the individual property of the said party of the first part so insufficient to pay his debts and liabilities in full, shall be applied *pro rata* to the payment of the said party's separate and individual debts and liabilities. If, however, any surplus remains of the net proceeds of the said separate and individual property of either of the said parties of the first part after payment of his separate and individual debts and liabilities in full, the said surplus shall be applied towards the payment of the copartnership debts and liabilities of the said parties of the first part.

3. The net proceeds of the copartnership property together with the surplus, if any, of the proceeds of the individual property of the said parties of the first part, or either or each of them shall be used in payment in full of the copartnership debts and liabilities of the said parties of the first part. If, however, said proceeds are not sufficient for that purpose, then the same shall be applied *pro rata* to the payment of said copartnership debts and liabilities.

4. If any surplus shall remain of the property and estate hereby assigned, after the payment of all the just debts owing by the parties of the first part, the party of the second part shall return the same to the parties of the first part, their executors, administrators or assigns, according to their respective rights thereto.

[Here insert power of attorney as in Form 42.]

[Here insert acceptance by assignee as in Form 42.]

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered }
in presence of }

Seal.
Seal.
Seal.

[Here insert acknowledgment as in Form 42.]

No. 46.**ASSIGNMENT WITH PREFERENCE.**

[As in Form No. 42 to the *, and then insert:]

To pay all and singular the debts set forth and enumerated in a schedule hereto annexed, marked Schedule "A," in full, with interest, if the residue of said proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the residue of said proceeds to and in the payment of the said debts ratably and in proportion to the respective amounts thereof.

After payment in full of all the debts designated in Schedule A, as above directed, the said party of the second part shall pay all and singular the debts set forth and enumerated in a schedule hereto annexed, marked Schedule "B," in full, with interest, if the said remaining proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the said remaining proceeds to and in payment of the said debts so set forth and enumerated in Schedule B ratably and in proportion to the respective amounts thereof. [When there are other classes of preferred creditors, the same formula may be repeated, the various classes of creditors in their order of priority being designated by schedules. After stating preferences, the balance must be applied to the payment of the remaining debts.] And after fully paying and discharging all the aforesaid debts as above provided, the said party of the second part shall pay all and singular all other debts and liabilities of the party of the first part, and if such residue be not sufficient to pay and discharge all such debts and liabilities in full, then the said party of the second part shall distribute the said proceeds among all the aforesaid other creditors of the said party of the first part ratably and in proportion. [Continue as in Form No. 42 from the **.]

SCHEDULE A.

Referred to and forming part of the annexed assignment, containing a statement of the names of creditors, first preferred in such assignment, the general nature of said indebtedness, and the amount thereof.

, amount due him for salary, and as commission
on sales, \$.

, amount due him for money lent and advanced
by him to the assignors, , with interest on

from , 18 , and on thereof from , 18 ;
the dates on which said sums were lent.

SCHEDULE B.

Referred to and forming part of the annexed assignment.
Containing a statement of the creditors second preferred in said
assignment, the general nature of said indebtedness, and the
amount thereof.

 , amount due him for money lent and advanced
on or about the day of , 18 , with interest from
the day of , 18 , up to which date interest has
been paid.

 , of the city of New York, being a balance now
remaining due upon an account made and stated between the
assignor and that firm, on the day of , 18 , for
money lent and advanced therefor to the assignor, with interest
from that date.

No. 47.

ASSIGNMENT WITH PREFERENCES. ANOTHER FORM.

[As in Form No. 42 to the *, and then insert:]

The said party of the second part shall pay in full to
 , of Brooklyn, E. D., New York, the amount of a
promissory note held by him, dated , 18 , for ,
made by said party of the first part, and given for money bor-
rowed by him of the said , together with interest thereon.
And after paying and discharging the said debt, if there should
be any residue or surplus of the said moneys remaining.

The said party of the second part shall pay in full to
 , the wife of , of , New Jersey,
the amount of a certain promissory note made by the said party
of the first part, and dated , 18 , payable to the order
of the said , and indorsed by , of county,
New York, and payable on demand at Broadway, city of
New York, for dollars, and given for money borrowed
by him of the said , together with interest thereupon.

And after fully paying and discharging said debt, if there
be any residue or surplus of the said moneys remaining:

The said party of the second part shall pay in full the
amount of a certain other promissory note made by the said
 , dated , 18 , payable to the order of ,
and & Co., in months after date, at the Bank

in the city of New York, for dollars, and indorsed by the said and & Co., for the sole accommodation of the said , and now held by . Bank of , N. Y. And after fully paying and discharging all of the aforementioned debts as above provided, then in trust to pay and apply the residue of the proceeds to the satisfaction and discharge of all and singular all other debts and liabilities of the party of the first part; and if such residue be not sufficient to pay and discharge all such debts and liabilities in full, then the said party of the second part shall distribute the said monies or proceeds among all other creditors of the said party of the first part ratably and in proportion to their respective demands, and without any preference or priority. [Continue as in Form No. 42 from the **.]

No. 48.

INVENTORY AND SCHEDULES.

(See § 272.)

1. [The name, occupation, place of residence and place of business of the debtor.]
2. [The name and place of residence of the assignee.]
3. A full and true account of all the creditors of _____, with the last known place of residence of each, the sum owing to each of them by the said _____, with the true cause and consideration therefor, and a full statement of any existing security, for the payment of the same.

Creditors.	Last known place of Residence.	Amount.	The true cause and consideration therefor.	A statement of any existing security for the payment of the same.

4. A full and true inventory of all the estate of _____, on the _____ day of _____, the date of the assignment of said _____, both real and personal, in law and in equity, and

the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal, as well as actual value of such estate, according to the best knowledge of said .

Assets.	Nominal value.	Actual value.	Cause of difference.

No. 49.

AFFIDAVIT TO INVENTORY AND SCHEDULES.

(See § 272.)

IN THE MATTER OF THE ASSIGNMENT.

of

to

for the benefit of creditors.

Affidavit of debtor.

County of , ss. :

, being sworn, says, that , the assignor named in the above assignment, which bears date the day of , 18 . Recorded in the office of the clerk of the county of , the day of , 18 . Also that the inventory and schedules hereto annexed contain a full and true account of all the creditors of said deponent, the last known place of residence of each creditor, where the same is known to deponent, and where the same is not known, the fact is so stated therein. Also, the sum owing to each creditor, and the nature of each debt or demand, whether arising on written security, account or otherwise. Also, the true cause and consideration of such indebtedness, in each case, and the place where such indebtedness arose. Also, a statement of any existing judgment, mortgage, collateral or other security for the payment of any such debts. Also, a full and true inventory of all the estate both real and personal in law and equity, of , at the date of said assignment, and the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of deponent. And deponent further says, that the annexed inventory and schedules, are in all respects, just and true, according to the best knowledge, information and belief of this deponent.)

Sworn to before me, this }
day of , 18 . }

No. 50.
ASSIGNEE'S BOND.

(See § 280.)

Know all men by these presents, that we, _____, residing at No _____ in the _____ and _____, residing at No. _____ in the _____ and _____, residing at No. _____ in the _____, are held and firmly bound unto the people of the State of New York, in the sum of _____ dollars, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents. Sealed with our seals.

Dated the _____ day of _____, one thousand eight hundred and _____

Whereas, _____ ha _____ made an assignment of _____ property, in trust to the above bounden _____, for the benefit of creditors, dated the _____ day of _____, one thousand eight hundred and _____. Recorded on the _____ day of _____, 18 _____, in the office of the clerk of the _____ county of _____.

Now, therefore, the condition of this obligation is such, that if the above bounden _____ shall faithfully execute and discharge the duties of such assignee, and duly account for all moneys received by him as such assignee, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the }
presence of _____ . }

County of _____, ss.:

_____, one of the sureties to the foregoing bond, being duly sworn, says, that he is a resident and _____ holder within this State, and is worth the sum of _____ dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me, this _____ }
day of _____, 18 _____. }

County of _____, ss.:

_____, one of the sureties to the foregoing bond, being duly sworn, says, that he is a resident and _____ holder within this State, and is worth the sum of _____ dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me, this _____ }
day of _____, 18 _____. }

88. :

I certify, that on this day of , 18 , before me personally appeared the within named , known to me to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same.

I hereby approve of the within bond, and of the sufficiency of the sureties therein.

No. 51.

PETITION FOR LEAVE TO FILE PROVISIONAL BOND.

(See § 285.)

To Hon.

The petition of [*assignee*], respectfully shows, that on the day of , 187 , A. B., of the city and county of New York, executed a general assignment for the benefit of creditors to your petitioner as assignee, which said general assignment was dated on the day of , 18 , and was on the day of , 18 , duly recorded in the office of the clerk of the city and county of New York, where the said [*assignor*], then resided [*or*, carried on business, or if a firm, where the principal place of business of said copartnership was situated]. That more than twenty days have elapsed since the date of said assignment, and that [*assignor*], therein named has failed to present an inventory or schedule as required by law, nor has any inventory or schedule of the said assigned estate been made or delivered, or filed herein. That your petitioner is unable to prepare and present such inventory and schedule at the present time for the reasons [Here state the reasons which have prevented the preparation of the inventory and schedules]. That your petitioner is desirous of fully qualifying as such assignee by giving a bond for the faithful discharge of his duties as required by law, and that it is desirable that he should give said bond and proceed to the further execution of his trust before the said inventory and schedule can be properly prepared and filed, for the reasons [Here state the reasons]. That your petitioner has made diligent inquiry to ascertain the extent and character of said assigned property, and that the property covered by said assignment is, as far as your petitioner has been able to ascertain the same, as follows [Here state the general character of the property, with such detail as the assignee has been able to obtain], and that the said property, according to your petitioner's information and belief, is of the actual value of dollars.

That the outstanding amounts due to the said assignor, as appears from his books, are of the nominal amount of dollars, and that the actual value thereof is as your petitioner is informed and believes, not to exceed the sum of dollars. That the cause of the difference between the actual and nominal value of said claims is as follows [Here state the character of the claims regarded doubtful or bad]. That the total value of the assets so assigned to your petitioner, as your petitioner is informed and believes, will not exceed the sum of dollars.

Wherefore your petitioner prays that he may have leave to file a provisional bond for the faithful discharge of his duties as such assignee, until such time as he may be able to present the schedule or inventory of said assigned estate, pursuant to the statute in such cases made and provided.

[Verification in usual form.]

Affidavits of experts as to value should also be presented.

No. 52.

ORDER ON SAME.

*In the Matter of the General
Assignment*

of

C. D.

On reading and filing the petition of , verified on the day of , 187 , and the affidavit of , verified on the day of , 187 , and on application of A. B., of counsel for said petitioner,

It is ordered, That the prayer of said petition be granted; that the said petitioner have leave to file a provisional bond to the People of the State of New York for the faithful discharge of his duties as assignee, and for the due accounting for all moneys received by him as assignee of the estate of C. D., under the general assignment executed by the said C. D. to the said A. B., and dated on the day of , 187 , in the penal sum of dollars, and with sufficient sureties to be approved by [one of the judges of this court]; and that, upon the filing of the inventory or schedule of said assigned estate, the said assignee do make and file a bond, with like condition, in such amount as may be then ordered or directed.

No. 53.**Petition of Assignee for Examination of Assignor or other Person
to enable him to prepare Inventory and Schedules.**

(See § 227.)

*In the Matter of the General
Assignment
of
C. D.*

To the Hon.

The petition of A. B., of , respectfully shows :

That, on the day of , 187 , C. D., then residing [*or*, doing business at ; *or*, if a firm, whose principal place of business was at], made and executed, in due form of law, a general assignment to your petitioner for the benefit of his creditors, which said assignment was on the day of , 187 , duly recorded in the office of the clerk of the county of ; and that your petitioner has accepted said assignment, and entered upon the discharge of his duties as such assignee.

That the said C. D. has omitted and neglected [*or*, refused] to make and deliver an inventory of his said assigned estate, and a schedule of his creditors as required by the statute in such cases made and provided ; [if an examination of a third person is desired, add :] that your petitioner is informed and believes that E. F., residing at , who was connected in business with the said C. D. as book-keeper, is possessed of information in reference to the extent and value of the stock in trade of said C. D., and as to the amounts due to him, and has in his possession, or under his control, the books kept by the said C. D. in his business as , which information is material to the preparation of said inventory and schedules ; and that a production of said books is likewise essential for the preparation of the same.

Wherefore, your petitioner prays that an order may be issued directing that C. D. [and E. F.] appear and disclose upon oath any knowledge or information that he [*or*, they, *or*, either of them] may possess, necessary to the proper making of the inventory and schedule required by law ; and that the said may be required to produce, upon such examination, any and all books containing entries relating to the business of said C. D., and now in his possession or under his control, and especially [here insert a description of the particular books].

Dated.

A. B.

[Verification in usual form.]

No. 54.**ORDER FOR EXAMINATION OF ASSIGNOR OR THIRD PERSON.**

*In the Matter of the General
Assignment
of
C. D.*

On reading and filing the petition of A. B., verified on the day of , 187 , and on application of , of counsel for said petitioner,

It is ordered, that C. D. [and E. F.] be and appear before me [or, one of the justices of the Court of Common Pleas for the city and county of New York], at the court house in the , on the day of , 187 , at o'clock A. M., then and there to disclose upon oath any knowledge or information they, or either of them, may possess necessary to the proper making of an inventory and schedule of the estate assigned by the said C. D. to the said A. B. by general assignment, dated on the day of , 187 , and of the creditors of the said C. D., as required by law.

And [if a production of books and papers is required, add:] the said is hereby directed to produce before me, at said time and place, the books and papers of the said C. D. in his possession or under his control, containing any entries in relation to the business or property of said C. D. as , and especially [here enumerate the books and papers referred to in the petition].

No. 55.**PETITION FOR LEAVE TO ADVERTISE FOR CLAIMS.**

(See § 360.)

*In the Matter of the General
Assignment
of
C. D.*

To. Hon.

The petition of A. B., of , respectfully shows :
That, on the day of , 187 , C. D., then residing
at [or, who carried on business at , or, if a firm,

whose principal place of business was _____], made and executed, in due form of law, a general assignment to your petitioner for the benefit of their creditors, which said assignment was, on the _____ day of _____, 187____, duly recorded in the office of the clerk of the county of _____;

That your petitioner has accepted said assignment, and entered upon the discharge of his duties as assignee under said assignment;

That your petitioner is informed from an examination of the books of said C. D. [or, from the inventory and schedules filed by said C. D., or otherwise, as the case may be], that certain of the creditors of the said C. D. reside out of the State of New York.

Wherefore your petitioner prays that he may be authorized to advertise for creditors to present to him their claims, with the vouchers therefor duly verified, in accordance with the statute in such cases made and provided.

Dated.

A. B.

[Verification in usual form.]

No. 56.

ORDER AUTHORIZING ASSIGNEE TO ADVERTISE FOR CLAIMS.

(See § 360.)

*In the Matter of the General
Assignment
of
C. D.*

On reading and filing the petition of A. B., verified on the _____ day of _____, 187____, and on application of _____, of counsel for said petitioner,

It is ordered, That the prayer of said petition be, and the same is hereby granted, and the said A. B. is hereby authorized to advertise for creditors of C. D. to present to him their claims, with the vouchers therefor, duly verified on or before a day to be specified in said advertisement, not less than thirty days from the last publication thereof, which said advertisement or notice shall be published once in each week for six successive weeks in the Daily Register, a newspaper published in the city of New York, and in the _____, a newspaper published in _____ [and when there are non-resident creditors, add:] and also in the _____, the State paper published at the city of Albany.

No. 57.**FORM OF ADVERTISEMENT.**

In pursuance of an order made by the Hon. _____, on the _____ day of _____, 187____, notice is hereby given to all the creditors and persons having claims against _____, lately doing business in the city and county of New York, under the firm name of _____, that they are required to present their claims, with the vouchers therefor, duly verified to the subscriber, the duly appointed assignee of the said _____, for the benefit of their creditors, at his place of transacting business, No. _____ street, in the city of New York, on or before the _____ day of _____, 187____.

Dated, New York _____ 187____.

Assignee.

Attorney for Assignee.

No. 58.**Petition by a Creditor for the Removal of the Assignee.**

(See § 353.)

*In the Matter of the General
Assignment*

of

C. D.

To the Hon.

The petition of E. F., residing at _____, respectfully shows, That on the _____ day of _____, 187____, A. D., then residing at _____, [or, who carried on business at _____, or, if a firm, whose principal place of business was at _____], made and executed, in due form of law, a general assignment to A. B., of _____, for the benefit of creditors; and that said assignment was, on the _____ day of _____, 187____, duly recorded in the office of the clerk of the county of _____; and that the said A. B. has accepted said assignment, and entered upon the discharge of his duties as assignee thereunder.

That your petitioner is a creditor of the said C. D., and entitled to share in the trust fund created by said assignment. That the grounds of your petitioner's claim against the said C. D. is as follows [here state the nature of the petitioner's claim].

State the grounds upon which the removal is sought, as follows:

That no inventory or schedules of the said assigned estate has been delivered or filed as required by law, either by the said C. D. or by the said A. B.; and that more than thirty days have elapsed since the date of said assignment, and that no further time has been allowed to the said assignee within which to make and file the same [*or*, that the extended time has elapsed],¹ or other grounds showing misconduct or incompetency of assignee (*ante*, § 351), and special reasons why an injunction should issue, as that the assignee has not given a bond and is selling and collecting the property, or that he is wasting the property, or threatening to remove it from the State, or that he is insolvent and has not given the bond, or other reason showing the property to be in jeopardy.

Wherefore your petitioner prays that an order may issue directing the said A. B. to show cause at a time and place to be therein named, and upon such notice as the court may direct, why he should not be removed from his office as assignee of the said assigned estate under the assignment aforesaid, and why some suitable person should not be appointed in his place and stead, and why the said A. B. should not render an account of his proceedings as such assignee; and that an injunction issue restraining the said A. B. from interfering with said assigned estate, and that a custodian or receiver of said estate be appointed, and that your petitioner may have such other relief, &c.

Dated

[Verification in usual form.]

No. 59.

ORDER TO SHOW CAUSE FOR REMOVAL OF ASSIGNEE.

(See § 354.)

Title.

On reading and filing the petition of E. F., verified on the day of , 187 , [and affidavits of , verified on the day of , &c.], and on application of , of counsel for said petitioner;

It is ordered, that A. B. show cause before me [*or*, one of the justices of this court, at a term thereof, to be held at

¹ See *ante*, § 272, upon the ground stated in this paragraph, the statute (*ante*, § 353) provides that the judge *shall* remove the assignee; upon other grounds, he *may*

the county court house in the city of _____, on the _____ day of _____, 187____, at _____ o'clock A. M., why he should not be removed from his office as assignee of the estate of C. D., under the general assignment made by the said C. D., and dated on the _____ day of _____, 187____; and why some suitable person should not be appointed in his place and stead, and why the said A. B. should not render an account of his proceedings as such assignee.

[And in the mean time, and until the final hearing herein, Ordered, that said A. B. desist and refrain from disposing of, or in any manner interfering with said assigned property or estate].

[And it is further ordered, that _____ be, and he is hereby appointed receiver or custodian of said assigned estate, upon making and filing a bond in the penal sum of \$ _____, with sureties to be approved by me].

And it is further ordered, that this order be served upon said C. D. and A. B., and the sureties upon the bond filed by the said A. B., and also upon [such other persons as the judge may prescribe, *e. g.*, upon all the persons named as creditors in the schedules on file, or upon all persons who have presented their claims to the assignee, or by publication], not less than five days before the return day thereof.

Dated _____

No. 60.

ORDER FOR REMOVAL OF ASSIGNEE.

Title.

A petition having been made and filed herein, on the _____ day of _____, 187____, praying among other things for the removal of A. B. from his office as assignee of C. D., under the general assignment made by said C. D., and dated on the _____ day of _____, 187____; and an order to show cause having been issued therein; Now upon reading said petition and order to show cause, and upon proof of due service of said order upon [the persons named in the order], and after hearing X. Y., of counsel for said petitioners, and U. Z., of counsel for the said A. B., &c.

It is ordered, that the said A. B. be, and he is hereby removed from his trust as assignee under said general assignment.

And it is further ordered, that E. F. be, and he is hereby appointed trustee of the said assigned estate, in the place and stead of the said A. B., upon giving a bond in the penal sum of _____ dollars, with sufficient sureties, to be approved

by me, for the faithful discharge of his duties as such assignee, and for the due accounting for all moneys received by him.

And it is further ordered, that upon proof of the filing and approval of such bond, the said A. B. pay over and surrender to the said E. F. all the property and estate, real and personal, which has come into his hands or under his control as such assignee, under the general assignment aforesaid, together with all the books, papers, and accounts relating thereto.

And it is further ordered, that the said A. B. render an account of his proceedings as assignee of the said assigned estate [and it is hereby referred to J. K., counsellor at law, to take and state the accounts of said A. B., as such assignee].

And it is further ordered, that a citation issue herein directed to all persons interested in the said assigned estate, to attend the settlement of said account.¹

And it is further ordered, that the injunction heretofore issued herein be, and the same is continued.

No. 61.

Petition for Leave to Compromise a Debt due the Estate.

(See § 319.)

Title.

To Hon.

The petition of A. B., of _____, respectfully shows:

That on the _____ day of _____, 18____, C. D., residing at _____ [or, who carried on business at _____, or, if a firm, whose principal place of business was at _____], made and executed, in due form of law, a general assignment to your petitioner for the benefit of his creditors, which said assignment was on the _____ day of _____, 18____, duly recorded in the office of the clerk of _____ county.

That your petitioner accepted said assignment and entered upon the execution of said trust.*

That among the property so assigned to your petitioner, is a certain claim against the firm of E., F. & Co., of _____, amounting, as appears by the schedules filed by the said C. D., and from his books, to the sum of _____ dollars.

That on or about the _____ day of _____, 18____, the said firm of E., F. & Co. failed and suspended business, and have proposed to their creditors a settlement of forty cents on

¹ If the proper parties are before the court on this application, no citation is necessary.

the dollar; that your petitioner has examined into the statement and affairs of said firm; that the total liabilities of said E., F. & Co. amount to \$, and their assets, to the best of deponent's knowledge, do not exceed the sum of \$, and that the said proposition of settlement appears to your petitioner to be just and fair.

Wherefore your petitioner prays your Honor's instruction and direction in the premises, as to whether your petitioner shall accept the said offer of composition, and shall compound the said indebtedness upon the terms hereinbefore stated, &c.

Dated,

No. 62.

Order for Leave to Compromise a Debt due the Estate.

(See § 319.)

Title.

Upon reading and filing the petition of A. B., verified on the day of , 18 , and on application of X. Y., of counsel for said petitioner, It is Ordered that the said A. B. be and he is hereby authorized to settle and compound the indebtedness of E., F. & Co. due to the assigned estate of C. D., upon receipt of 40 per cent. of the said indebtedness.

No. 63.

Petition by Creditor for a Citation for Final Accounting.

(See § 383.)

*In the matter of the final account-
ing of*

A. B.,

*as assignee of the estate of C. D., un-
der a general assignment made
by C. D., and dated on the
day of , 18 .*

To the Hon. , Court of :

The petition of E. F. respectfully shows:

That on the day of , 18 , C. D., residing
at [or, who carried on business at , or, if a firm,
whose principal place of business was at], made and

executed, in due form of law, a general assignment of his property and estate, for the benefit of his creditors, to A. B., which said assignment was, on the day of , 18 , duly recorded in the office of the clerk of county; and that the said A. B. accepted said assignment and entered upon the execution of his trust thereunder, and took possession of said assigned property.

That your petitioner is interested in said assigned estate as a creditor of said C. D., and is entitled to share in the distribution thereof.

That the grounds of your petitioner's claims are as follows : [here state them], [and that your petitioner's name, and the said indebtedness due to him, are included in the inventory and schedules made and filed by the said C. D.].

[That your petitioner is informed and believes that the said A. B. applied to Hon. , for an order authorizing him to advertise for creditors to present to him their claims, and that said order was granted, and that the said advertisement was made, and that the time within which creditors were required to present their claims has expired.]

That more than a year has elapsed since the date of said assignment, and that no account of the proceedings of the said A. B., as such assignee, has been made.

Wherefore your petitioner prays that a citation may issue out of and under the seal of this honorable court, to all persons interested in the said assigned estate, requiring them to appear in court upon some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account, &c.

Dated,

[Verification in usual form.]

No. 64.

Petition by Assignee for Citation for Final Accounting.

(See § 383.)

To the Hon. Court :

The petition of A. B. respectfully shows :

[As in Form No. 61 to the *, and continue:]

That the inventory and schedule required by law was made and filed by the said C. D. [*or*, by your petitioner], on the day of , 18 , in the office of the clerk of the Court of Common Pleas, for the city and county of New York; and that your petitioner made and filed, on the

day of , 18 , a bond for the faithful discharge of his duties as such assignee, and for the due accounting for all moneys, which said bond was duly approved, and upon said bond and were sureties.

That thereafter, and on the day of , 18 , your petitioner applied for and obtained from Hon. , Judge, &c., an order authorizing your petitioners to advertise for creditors to present to him their claims on or before a day to be therein specified, and that the said notice was duly published as provided by said order, and that the time within which claims were to be presented to your petitioner has expired, and that the following named creditors have presented claims to your petitioner, and are or claim to be interested in the distribution of the trust fund created by said assignment.

[Here insert names and addresses of creditors who have presented claims.¹]

[Prayer as in Form No. 63.]

No. 65.

ORDER FOR CITATION.

At a Special Term of the Court of Common
Pleas for the city and county of New
York, held, &c.

Present, Hon.

[Title as in Form No. 63.]

On reading and filing the petition of A. B. [*or*, E. F.], verified on the day of , 18 , and on application of , of counsel for said petitioner, It is Ordered that a citation issue herein to all parties interested in the estate assigned by C. D. to A. B., by a general assignment dated on the day of , 18 , and recorded in the office of the clerk of the county of , to appear in court on a day therein to be specified, and to show cause why a settlement of the account of proceedings of the said A. B., as such assignee, should not be had, and if no cause be shown, to attend the settlement of such account.

¹ The act provides (see *ante*, § 388) that the citation must be served upon all parties interested in the fund, except that if the time limited by due advertisement for presentation of claims has expired, creditors who have not duly presented their claims need not be served. In order that the court may know that all parties entitled to notice have been served, this clause should be inserted.

No. 66.**CITATION FOR ACCOUNTING.**

(See § 387.)

The People of the State of New York, to all persons interested in the estate assigned by C. D. to A. B. for the benefit of creditors, as creditors or otherwise:

You and each of you are hereby cited and required to appear [in court before Hon. _____, county judge of _____, or, at a special term of the Court of Common Pleas, for the city and county of New York, to be held] at the county court house in the _____ of _____, on the _____ day of _____, 18____, at _____ o'clock in the forenoon, to show cause why a settlement of the account of proceedings of A. B., as assignee of the said assigned estate, should not be had, and if no cause be shown, to attend a settlement of such account.

Witness, Hon. _____, Judge of _____, and the seal of said court, the _____ day of _____, in the year of our Lord, one thousand eight hundred and _____.
[Seal.] _____, Clerk.

No. 67.**ASSIGNEE'S ACCOUNT.**

(See § 374.)

[Title.]

To the Hon. the Court of Common Pleas for the city and county of New York:

I, A. B., of _____, do render the following account of my proceedings as assignee of C. D.:

On the _____ day of _____, 187____, the said C. D., then residing or carrying on business at _____, made and executed in due form of law, a general assignment of his property and estate to me in trust for the benefit of his creditors, which said assignment was on the _____ day of _____, 187____, duly recorded in the office of the clerk of the county of _____. I accepted said assignment and entered upon the execution of the trust thereunder, and took possession of the said assigned property.

On the _____ day of _____, 187____, an inventory of the said assigned property, and a schedule of creditors, as required by law, was made and delivered by said C. D. [or, by me], and was on said day duly filed in the office of the clerk of the Court of Common Pleas, for the city and county of New York, by which it appears that the debts and liabilities of the above-named C. D. amount to the sum of _____ dollars, and his nominal assets to the sum of _____ dollars, and that the actual value of the same was _____ dollars.

Schedule "A," hereto annexed contains a statement of all the property contained in said inventory, sold by me at public or private sale, with the prices and manner of sale; which sales were fairly made by me at the best prices that could then be had, with due diligence, as I then believed; it also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest for moneys received by me, for which I am legally accountable.

Schedule "B," hereto annexed contains a statement of all property belonging to the estate which have come into my hands not included in the said inventory.

Schedule "C," hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectable by me, together with the reasons why the same have not been collected and are not collectable, and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein, lost by accident, without any wilful default or negligence, the cause of its loss, and appraised value. No other assets than those in said inventory, or herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said estate is allowed or charged in said schedules "A" and "B."

Schedule "D," hereto annexed, contains a statement of all moneys paid by me for all necessary expenses for said estate, together with the reasons and object of such expenditure.

On or about the day of , 18 , I caused a notice for creditors to present their claims against the said C. D., to me, within the period fixed by law, and at a place therein appointed, to be published in the newspapers, according to law, for , pursuant to an order of the Hon. , one of the judges of Court of Common Pleas of the city and county of New York, to which order, notice and due proof of publication herewith filed, I refer as part of the account.

Schedule "E," hereto annexed, contains a statement of all the claims of creditors presented to me in pursuance of said notice, together with the names of the claimants, the general nature of the claim with the amount and the date thereof, and also a statement of all moneys paid by me on account of said claims, with the names and the time of such payment.

Schedule "F," hereto annexed, contains a statement of all other facts affecting my administration of said insolvent's estate, my rights and those of others interested therein.

No. 69.**ORDER OF REFERENCE.**

(See §§ 370, 392.)

At a Special Term of the Court of Common Pleas for the city and county of New York, held at the County Court House, New York City, on the
day of , 18 .

Present,

Hon.

[Title, as in Form No. 63.]

A petition having been duly made and filed herein, by , praying that an order be granted for a citation to be issued to all persons interested in the estate assigned by C. D. to A. B., for the benefit of creditors, dated the day of , 18 , and the said order having been made and entered, and the said citation having been duly issued thereon: Now, on reading and filing the said citation and proof of due service thereof on [the assignor, assignees, and their sureties, and on all creditors whose claims have been duly presented after publication of notice. See § 388] ; and the said A. B. [the assignee] appearing herein by , his attorneys, and having presented his accounts of his proceedings as assignee of the estate of C. D., and [here insert all the appearances] and objections to said accounts having been presented by , It is ordered, that it be referred to X. Y., counsellor at law, to take and state the accounts of the said A. B., of his proceedings as assignee of the said assigned estate, with authority to the said X. Y. to examine the parties and witnesses on oath in relation to the said assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions, and the production of books and papers. And it is further ordered, that the said referee take proofs and report as to what persons are entitled to share in the distribution of said assigned estate, and in what priority and proportion. And it is further ordered that any party to this proceeding, and any creditor, may object to any claim presented before said referee, and that the said referee shall thereupon take the proofs and report as to the validity of such contested claims. And it is further ordered that the said reference proceed at , and that days notice of the time and place of the first hearing be given to all creditors who have presented their claims to said assignee, or who have appeared upon the return of said citation.

No. 70.**REFEREE'S REPORT ON ACCOUNTING.**

(See §§ 380, 392.)

[Title.]

*To the Court of Common Pleas for the City and County of
New York.*

In pursuance of an order of reference made in the above entitled proceeding, on the day of , 18 , by which it was referred to me to take and state the accounts of A. B., as assignee of the estate assigned by C. D. for the benefit of creditors, and [continue as in the order of reference].

I do respectfully report :

That a notice to proceed before me on said reference was duly served on the attorneys for the and for the day of , 18 , at o'clock, at my office, No. street, New York city.

[Said notice and admission of the same, indorsed thereon, is hereto annexed, marked Exhibit A.]

I was attended at said time and place by , Esq., counsel for , assignee ; , Esq., counsel for ; , attorneys for ; that said reference was thereupon proceeded with, and adjourned from time to time, to the day of , 18 .

That upon such examination I took the proofs offered by the several parties, which are hereto annexed.

I further report, that in pursuance of an order of Hon. , dated , 18 (a copy of which is hereto annexed, Marked Exhibit B.), a notice requiring all persons having claims against , to present the same to , the said assignee, was duly published as required by said order.

(Said notice, and proofs of publication of same, are hereto annexed, marked Exhibits C and D.)

I further report that the following claims against said

 , were presented to said assignee.

Claim of , for \$, which is hereto annexed, marked Exhibit F.

Claim of , for \$, which is hereto annexed, marked Exhibit G.

Claim of , for \$, which is hereto annexed, marked Exhibit H, &c.

The interest on each of these claims has been allowed to the day of , 18 , and the amount of the claims, including such interest, is hereafter given.

And I further report that I have taken the proofs presented by said several claimants in support of their claims, which are

annexed to this, my report. That objections were presented by and to the claim of , hereinbefore referred to, and marked Exhibit , and that the said parties presented to me their proofs and allegations in support of said claim, and their objections thereto, which are hereto annexed, and that, in my opinion, said claim should be allowed [*or*, disallowed, *or*, should be allowed at dollars].

I further report that the claims against the said estate, which, in my opinion, should be allowed, with respective amounts thereof, are as follows :

[Here insert claims allowed, and] that the claims presented against said estate, which, in my opinion, should not be allowed, are as follows :

[Here insert claims disallowed.]

I further report that the said assignee appeared before me upon said accounting, and the said assignee thereupon produced and submitted to me the account of his proceedings as such assignee, and I thereupon entered upon the examination thereof. Said accounts will be found accompanying this, my report. I proceeded to the examination of his accounts, checking the items and examining the vouchers. I have marked such vouchers as have been produced by the assignee, as Exhibits to , inclusive, and said vouchers will be found accompanying this my report.

The said assignee has received from collections and sales of the assigned property, the sum of dollars, and has paid out and expended for the purposes of said trust, the sum of \$, and there is a balance in the hands of said assignee of the sum of dollars.

I am of the opinion that the assignee has discreetly and creditably discharged his trust, and I find, after a careful examination, that his accounts are correct, and so report.

I think that the assignee is entitled to the amount of \$ for his compensation as such assignee.

I further report that after the payment of the said compensation to said assignee, and said allowances and expenses of this proceeding, the balance should be distributed between the following named creditors, according to the following priorities and in the proportions named.

[Here insert priorities and order of payment.]

All of which is respectfully reported.

No. 71.**FINAL DECREE.**

(See § 382.)

At a special term, &c.

Title.

A citation having been duly issued herein to all persons interested in the estate assigned by C. D. to A. B. for the benefit of creditors, dated the day of , 187 , to attend the settlement of the accounts of the said A. B., as assignee of said estate, which said citation was dated on the day of , 187 ; and was made returnable on the day of , 187 ; and due proof of the due service of said citation upon , [here recite the services and appearances], and the said A. B. having appeared and presented his report upon said return day, [and objections having been presented to said report by E. F. and G. H.]; and it having been referred to , Esq., counsellor at law, to take and state said account [reciting the provisions of the order of reference], and the said referee having made and filed his report herein on the day of , 187 ; and due notice of the filing of said report having been given to , and exceptions to said report having been filed by ; Now, upon reading said report, and the testimony, exhibits, and vouchers thereto annexed, and the objections to said report filed by the said , and after hearing , of counsel, in behalf of , and [recite appearances], and due consideration having been had,

It is ordered, adjudged, and decreed :

First. That the report of said referee, filed on the said day of , 187 , be, and the same is hereby in all respects confirmed.

Second. That out of the funds in the hands of the said A. B., as assignee of the said estate of C. D., the said assignee pay to , the attorney for said assignee, the sum of dollars, for his costs and allowance in this proceeding; and the further sum of dollars to , referee aforesaid, for his fees as such referee; and out of the rest and residue of said funds remaining in the hands of said assignee, after deducting the costs and expenses aforesaid, said assignee is directed to make payment between the following named creditors, whose several claims are settled and adjusted at the sums set opposite their names respectively, according to the [following order of priority, amounts set opposite their names respectively in proportion to said amounts *pro rata*].

[Here insert names of creditors and amounts due them.]

Third. That the said assignee do take good and sufficient vouchers for each and every payment so made; and if, after reasonable diligence, any of the persons so entitled to share in

said distribution cannot be found, or shall decline or neglect to accept their said share, then the share so belonging to such person shall be deposited in the Trust Company, to the credit of such persons.

It is further ordered, adjudged, and decreed, that upon compliance with the foregoing provisions, the said assignee shall, upon presenting due proof of the same to one of the judges of this court, be entitled to an order relieving him of his liability as such assignee, and releasing the sureties upon the bond filed by the said A. B., as assignee of said estate from all liability upon matters included in the aforesaid accounting, to all creditors who have appeared, and to such creditors as have not appeared after due citation, and to such creditors as have not presented their claims after due advertisement; and that the said application may be made without further notice.

No. 72.

COMPOSITION DEED.

Whereas A. B. of , does justly owe and is indebted unto us, his several creditors, in divers sums of money, but by reason of many losses, disappointments and other damages happened unto the said A. B., he has become unable to pay and satisfy us our full debts and just claims and demands, and therefore we, the said creditors, have resolved and agreed to undergo a certain loss and to accept of twenty-five cents for every dollar owing by the said A. B. to us the several and respective creditors aforesaid, to be paid in full satisfaction and discharge of our several and respective debts. Now, know all men by these presents, that we, the several creditors of the said A. B., do for ourselves severally and respectively, and for our several and respective heirs, executors and administrators, covenant, promise, compound and agree to and with the said A. B. and between ourselves, that we will accept, receive and take of and from the said A. B., for each and every dollar that the said A. B. does owe and is indebted unto us, the said several and respective creditors, the sum of twenty-five cents, to be paid in the manner following, that is to say: [in instalments to be secured by notes of debtor indorsed by third person, or as the case may be, and to be delivered by a day certain].

And we, the said creditors, do further covenant and agree, that neither we, the said several and respective creditors, nor either of us, shall or will, at any time or times hereafter [except upon default in the delivery or payment of said notes so indorsed as aforesaid, or either or any of them], sue, arrest, molest or trouble the said A. B., or his goods and chattels, for any

debt or other thing [now due or owing to us or any of us], *or* [for any liability now existing against the said A. B., in favor of us or either of us], provided, however, that should default be made by the said A. B., in the delivery of the said notes indorsed as aforesaid, and within the time aforesaid [*or*, upon default in the payment of said notes, or any or either of them], these presents shall be void and of no effect, [provided always, and it is hereby agreed and declared, that these presents shall not in anywise prejudice or affect the rights or remedies of any creditor against any surety or sureties, or any person or persons other than the debtor, his heirs, executors or administrators, nor any security which any creditor may have or claim for his debt or debts], [and it is further expressly understood and agreed that unless the said composition shall be accepted by all the creditors of the said A. B., on or before the expiration of days from the date of these presents, these presents shall be void and of no effect].

And all and every of the grants, covenants, agreements and conditions herein contained, shall extend to and bind our several executors, administrators and assigns, as well as ourselves.

In witness whereof we, the said several creditors of said A. B., have hereunto set our hands and seals this day of , 18 .

[Other forms of Composition deeds and letters of license, may be found in Abbott's Clerks and Conveyancer's Assistant, pp. 304, *et seq.*]

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GENERAL INDEX.

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